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IN THE

Supreme Court of the United States

October Term, 1986

WADE POWELL AND FREDA POWELL, HIS WIFE,
AND ERWIN WHITE AND SUSAN WHITE, HIS WIFE,
Petitioners,

v.

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER,
WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN,
NORTH FLORIDA LIONS EYE BANK, INC.,
THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC.,
FLORIDA SOCIETY OF OPHTHALMOLOGY, INC.,
METROPOLITAN DADE COUNTY
AND THE FLORIDA MEDICAL ASSOCIATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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MARCH 20, 1987

QUESTIONS PRESENTED

1. Does the state's removal of the corneas of a decedent without the consent of the next of kin violate the family's fundamental rights of privacy or personal liberty protected by the due process clause?

2. If no fundamental rights are involved, are nonfundamental rights of the family, which are protected by procedural due process constraints, violated when the state removes corneas from a decedent without first seeking or obtaining the consent of the next of kin?

PARTIES BELOW

Petitioners are Wade and Freda Powell, and Erwin and Susan White, parents of children whose corneas were removed shortly after their death pursuant to the challenged statute. Respondents, the State of Florida, Munroe Regional

Medical Center, William H. Shutze, Keith Gauger, and Thomas M. Techman were sued for the removals, and North Florida Lions Eye Bank, Inc., The Medical Eye Bank, Inc., Florida Lions Eye Bank, Inc., Florida Society of Ophthalmology, Inc., Metropolitan Dade County and the Florida Medical Association intervened on the side of the defendants below.

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In the
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October Term, 1986

WADE POWELL AND FREDA POWELL,
HIS WIFE, et. al.,

Petitioners,

v.

STATE OF FLORIDA, et.al.,

Respondents.

PETITION

Wade Powell and Freda Powell, his wife, and Erwin White and Susan White, his wife, petition the Court to issue a writ of certiorari to the Supreme Court of Florida to review a judgment and order of that Court rendered on December 22, 1986.

OPINIONS BELOW

The trial court entered an order holding Section 732.9185, Florida Statutes, unconstitutional in two

consolidated cases which presented the question. The trial court's order is not reported, but is set out in the appendix filed with this petition at A. 57-76. The state appealed to the Fifth District Court of Appeal of Florida, and that court asked the Supreme Court of Florida to hear the case without intermediate review because of the great public importance of the issues presented. A. 54-56. The opinion of the Supreme Court of Florida is reported as State of Florida v. Powell, 497 So.2d 1188 (Fla. 1986), and is set out in the appendix at A. 1-53.

JURISDICTIONAL STATEMENT

This is a petition for writ of certiorari to the Supreme Court of Florida to review its decision upholding the constitutionality of Section 732.9185, Florida Statutes, the cornea removal

statute. That court filed its opinion on October 30, 1986, and denied rehearing on December 22, 1986. This Court has jurisdiction over this cause pursuant to 28 U.S.C. Section 1257(3), which provides for review by writ of certiorari where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution of the United States.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioners seek the invalidation of the cornea removal statute, Section 732.9185, Florida Statutes, on the grounds that it is repugnant to the Constitution of the United States. The

1. The order under review is such a decision. The Supreme Court of Florida specifically rejected petitioners' arguments that the cornea removal statute deprived them of due process of law as guaranteed by the United States Constitution. That court held that the petitioners had no constitutionally protected interest in the remains of their dead children.

challenged statute is set out in the appendix at A. 80-81.

Resolution of the constitutional question presented would involve the following provisions of the Constitution of the United States: the Due Process Clause of the Fifth and Fourteenth Amendments. Those provisions are set out in the appendix at A. 77-78.

STATEMENT OF THE CASE

The Challenged Statute

The challenged statute, Section 732.9185, Florida Statutes, authorizes the district medical examiner or qualified designee to provide the cornea of a decedent to an eye bank for transplant where the decedent is under the jurisdiction of the medical examiner and an autopsy is required,[2] no objection by the

2. Section 406.11, Florida Statutes, which describes when an autopsy is required, is set out in the appendix at A. 79-80.

next of kin of the decedent is known,[3] and the cornea removal will not interfere with the subsequent course of an investigation or autopsy. A. 80-81. The statute specifically immunizes the person removing the cornea from criminal or civil liability for failure to obtain consent of next of kin. A. 81. The statute is routinely implemented by district medical examiners and their designees throughout the state, and the section has increased both the supply and quality of corneal tissue available for transplant. A. 15.

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3. No inquiry is required. The trial court found:

> It is the policy of the Office of the Medical Examiner not to solicit objections to the corneal removal or to advise next of kin of the intent to remove corneas.

A. 65.

The Material Facts

The undisputed facts[4] are that on July 11, 1983, at approximately 2:00 a.m., Anthony Wayne Powell, a twenty year old single male, and the son of petitioners Wade and Freda Powell, was severely injured as a passenger in a motor vehicle collision. He was admitted to respondent Munroe Medical Center at approximately 4:49 a.m. and pronounced dead at that time. Wade Powell was notified of the accident and came to the hospital and identified his son's body at approximately 5:15 a.m. He and his wife then went into an adjacent waiting room where they remained until 7:30 a.m. At approximately 6:30 a.m., Anthony's corneas were removed by a technician un-

4. The following facts are almost verbatim recitations of the findings of fact made by the trial court. Those findings appear, in full, in the appendix at A. 60-66.

der the direction of respondent William H. Shutze, the District Medical Examiner. No one asked Anthony's parents, who waited in the next room, whether they had any objection to the removal of their son's corneas, or whether they consented to the removal. Had they been asked, they would have objected and would not have consented to the removal. At approximately 7:30 a.m. Wade and Freda Powell left the hospital, unaware that their son's corneas had been removed.

On June 15, 1983, James E. White, age 15, drowned while swimming. His body was taken to the Munroe Regional Medical Center. Respondent Keith Gauger of the medical examiner's office informed petitioner Erwin White that an autopsy would be performed, and petitioner Erwin White objected. Gauger told White that it would only be neccessary to make a small

incision into the chest. Gauger did not mention that they planned to take the corneas as well. White discovered that the corneas had been taken at the funeral home, when he asked why his son's eyes were noticeably sunken into the skull. The funeral director explained that the condition was the result of cornea removal. A.45-46. In short, it is undisputed that:

> [i]n each instance, under the authority of section 732.9185, the medical examiner removed corneal tissue from the decedent without giving notice to or obtaining consent from the parents of the decedent.

A.9.

It is also undisputed that the medical examiners and their designees were acting pursuant to official policy of the office when they failed and refused to notify family members that the corneas would be removed. A.65. This official

silence was kept to prevent next of kin from effectively exercising their right to object to the removal.

Proceedings in the Trial Court

The parents brought actions for damages and to have the statute declared unconstitutional. Their two separate actions were consolidated, and the trial court decided the constitutional challenge on summary judgment. The trial court found that, while the purpose of the statute was commendable, it was constitutionally infirm. The court found that the statute was unconstitutional on its face because it did not require that the next of kin be notified of a proposed removal, and because it did not require either the decedent while living, or the next of kin after death, to consent to the removal. Specifically, the trial court held:

[2]a. Plaintiffs [petitioners] have a right to receive, possess and dispose of the body of their sons in the same condition as his death left it, except for the results of a lawful autopsy.

b. This right is an intimately personal and fundamental one implicit in the concept of ordered liberty and may not be transgressed or interfered with by State action without a compelling state interest.

* * *

d. Section 732.9185 deprives plaintiffs [petitioners] of this right without affording them procedural or substantive due process of law guaranteed by the 5th and 14th Amendments to the United States Constitution....

* * *

3. There is no compelling state interest in the removal of cornea from deceased persons, without consent from the next of kin, which outweighs the rights of the surviving next of kin to possession and disposition of the deceased's body in the same condition as when death occurred.

A.69-74. The trial court's order holding the challenged statute unconstitutional was entered on August 23, 1985.

Proceedings in the District Court of Appeal

The State of Florida appealed to the Fifth District Court of Appeal. That court determined that the constitutionality of Section 732.9185, Florida Statutes, was an issue of great public importance, and it requested that the Supreme Court of Florida decide the case without intermediate review. A.54-56.

Proceedings in the Supreme Court of Florida

The Supreme Court of Florida accepted the case, and scheduled it for expedited briefing and oral argument. Amici appeared on both sides of the questions presented. The Court reversed the trial court's decision that the statute

was unconstitutional, and held that the record clearly established that the challenged statute reasonably achieves the permissible legislative objective of providing sight to many of Florida's blind citizens.[5] The court found that the decedent's rights terminated at death, and that the family had no constitutionally protected property, liberty or privacy interest in the dead family member's remains. Because the court found that petitioners have no protected liberty or property interest in the remains

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5. The court emphasized a number of facts in reaching its conclusion, including the state's costs in providing for the blind, the need for corneal tissue for transplant to restore sight to the blind, the shortage of corneal tissue suitable for transplant, the superior quality of tissue taken pursuant to the statute as compared to donated tissue, the need to remove the tissue within ten hours after death, the fact that tissue would only be removed from bodies undergoing an autopsy, and the fact that the decedent's eyes must be capped whether or not the corneas are taken to maintain a normal appearance.

of their decedents, it found it unnecessary to address the argument that the challenged statute violated procedural due process protections. A.28.

REASONS WHY REVIEW SHOULD BE GRANTED

1. It is important that this Court resolve the questions presented because medical advance is inevitable, and as our technological abilities increase in the transplantation area, so will the demand for parts from the bodies of the dead. Legislation authorizing the taking of body parts to help satisfy that demand does not always recognize that the family of the decedent has rights which are violated by the taking of body parts without seeking or obtaining consent. However, by definition, each transplantation involves two human bodies and two families. This Court must assure that legislative efforts do not fail to give the weight

the Constitution requires to the interests of all involved.

Everyone must live with the certainty of death, and with the fear that generates. There accordingly is a strong societal interest in rituals and practices, religious and otherwise, which help us go through the transitional period which follows the loss of a loved one.[6]

> Since the most ancient of times people have had a reverent regard for the remains of their loved ones, especially of children for their parents and parents for their children; and this naturally includes an ardent desire that their remains be treated with respect and re-

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6.

> Though a person's death is, of all that happens to him, that in which he is most alone, it always and everywhere arouses the strongest sort of social interest and initiates complex responses of communal activity, of which proper burial is one of the chief.

Quay, "Utilizing the Bodies of the Dead," 28 St. Louis L.J. 889, 900 (1984).

> main in undisturbed peace and rest.

In the Matter of Estate of Moyer, 577 P.2d 108, 110 (Utah 1978). These rituals and practices help all of us to fear no evil when we walk through the "valley of the shadow of death." See Psalm 23. Government must honor these rituals and practices, because, like marriage, they are older than government itself, see Griswold v. Connecticut, 381 U.S. 479 (1970), and are part of the evolutionary process which has shaped our very species.

Rituals and practices concerning the care and burial of the dead have historically and traditionally been governed by family choice. The trial court found:

> Since the beginning of time man has regarded the control, possession and custody of the body and remains of a deceased family member as a basic and cherished right. There are deep religious, moral and philosoph-

ical beliefs and convictions upon which this view is predicated.

A.66. In its period of sorrow over the loss of a loved one, the family comes together, perhaps as at no other time. The intense personal sharing that occurs at such times is one of the defining characteristics of the family. Indeed, dealing with the death of close relatives is one of the most important functions of the family.

Because our history and traditions strongly support family choice concerning this intensely personal matter, it must be an aspect of that "freedom of personal choice in matters of ... family life" that is protected by due process. See Zablocki v. Redhail, 434 U.S. 374, 385 (1978); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); Cleveland Board of Education v.

LaFleur, 414 U.S. 632, 639-40 (1974); see also Kelley v. Johnson, 425 U.S. 238, 244 (1976) ("freedom of choice with respect to certain basic matters of...family life"). Family decision-making in this area is undoubtedly one of those "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," and it is therefore within the definition of liberty protected by the due process clause. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); accord Moore v. City of E. Cleveland, 431 U.S. at 499 (Powell, J.); id. at 536 (Stewart, J. and Rehnquist, J., dissenting); id. at 545-46 (White, J., dissenting); Ingraham v. Wright, 430 U.S. 651, 673 (1977); Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

The rights at issue here are fundamental. They are "'implicit in the con-

cept of ordered liberty'" and "'deeply rooted in this Nation's history and tradition.'" Bowers v. Hardwick, __ U.S. __, 106 S.Ct. 2841, 2844, (1986). They share aspects of other fundamental rights which have been recognized by the Court. They arise in the context of the family relationship. They embody societal values and are informed by religious beliefs. They involve matters of personal choice which should be exercised free from governmental interference.

Petitioners' argument in this regard was well summarized when it was rejected by the Supreme Court of Florida:

> Appellees [petitioners] also assert that their right to control the disposition of their decedents' remains is a fundamental right of personal liberty protected against unreasonable governmental intrusion by the due process clause. Appellees [petitioners] argue that, because the statute permits the removal of a decedent's corneas without refer-

ence to his family's preferences, it infringes upon a right, characterized as one of religion, family, or privacy, which is fundamental and must be subjected to strict scrutiny. Appellees [petitioners] rely upon a line of decisions from the United States Supreme Court which recognizes the freedom of personal choice in matters of family life as one of the liberties protected by the due process clause. See e.g. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Appellees [petitioners] also point out that the United States Supreme court has found rights to personal privacy in connection with activities relating to marriage, Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); procreation, Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 86 L.Ed. 1655 (1942); contraception, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); abortion, Roe v. Wade; and child-rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Ac-

> cording to appellees [petitioners], the theme which runs through these cases, and which compels the invalidation of section 732.9185, is the protection from governmental interference of the right of free choice in decisions of fundamental importance to the family.

A.23-25.

The court below rejected petitioners argument for a reason which is on its face unsound.

> We reject appellees' [petitioners'] argument. The cases cited recognize only freedom of choice concerning personal matters involved in existing, ongoing relationships among living persons as fundamental or essential to the pursuit of happiness by free persons.

A.26. Although it is true that the decedent no longer has a physical relationship with the family, that fact does not distinguish the cases. The challenged statute has a significant impact on the living family, and that is the point.

The challenged statute is invalid because it permits the state to exercise unchecked veto power over intensely personal matters of family choice protected from government interference by the due process clause.

Reverence for the dead is a theme which runs through most societies and religions,[7] and is perhaps one of the things which makes man civilized.[8] The

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7.

> Most religions in the world hold that the remains of a deceased must be treated with honor and respect.

Kohn v. United States, 591 F.Supp. 568 (E.D.N.Y. 1984) aff'd 760 F.2d 253 (1985).

8.

> Is it only an unsophisticated aestheticism, or a reason more profound, that senses something possibly akin to cannibalism in the flying of a dying youth to a distant transplant center for use of his kidneys, liver, heart, lungs and skin? Such questions are hardly asked, let alone answered. The noisy rush to let the scientific wonder of transplantation blurs the ques-

difference between the human cadaver and the animal carcass is seen as the difference between the sacred, which is to be treated with unfailing reverence, and that which is of value, and may be used in any manner suited to its worth. Quay, supra, at 903. When the state takes body parts from a decedent's remains against the family's wishes, the intrusion cannot be judged in traditional tort or commercial property terms. Important liberty and privacy interests are involved, and human values must be taken into consideration.

The nature of the religious or conscientious values which are infringed by

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> tions perhaps implicit in Sir Theodore Fox's admonition:
> ". . . We shall have to learn to refrain from doing things merely because we know how to do them."

Louisell, "The Procurement of Organs And Transplantation," 64 Northwestern U. L. Rev. 607, 622 (1970).

the challenged statute will necessarily differ from individual to individual. The orthodox Jewish position may be the clearest.

> Judaism believes in the principle that body and soul are sacred because both are the handwork of God and hence are entitled to reverence. [citations omitted.] In accordance with this premise Jewish law teaches that the whole body should be buried, and that if the parts have been removed, for examination or otherwise, they must be returned and buried with the rest of the body.

Kohn v. United States, 591 F.Supp. at 572-73. Religious objection is not limited to those who belong to an organized religion that has a standing objection to the removal of body parts.

> Although there may be no formal objection by the different religious authorities to removal of organs from cadavers for transplantation, individuals may object on the ground that it violates their own religious beliefs. A fundamentalist Christian, for example, might believe organ removal is

> inconsistent with the principle of bodily resurrection, even though Catholic theologians are to the contrary. A Jehovah's Witness or a Christian Scientist might object to the shedding of blood or the surgical operation. Or a person may have some unorthodox eschatological belief which would be offended by removal.

Sanders and Dukeminier, "Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation," 15 UCLA L. Rev. 357, 406-07 (1968).

Other people in this society, like petitioners, have a conscientious objection to the taking of parts of the bodies of their deceased family members. Whether the objection is based upon religious tenet, individual religious belief, or is a matter of conscience, it should be respected by the state,[9] absent a compelling state interest.[10] The state may

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9. See United States v. Seeger, 380 U.S. 163 (1965).
10. The trial court found that the government failed to demonstrate a

decide that it will assist in the provision of body parts for transplant. But it may not do so by authorizing the taking of needed parts without even attempting to secure consent. When and how the government should be permitted to obtain body parts for transplantation is one of the important questions of the age.[11]

2. The court also erred because, even if the rights violated by the state are

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compelling state interest to justify the intrusion. A.74. The Supreme Court of Florida did not reach the issue because it held that the next of kin has no protected interest in the decedent's remains.

11. This question should not be decided without reference to popular attitudes toward the taking of body parts without consent. A recent study reveals that the overwhelming majority of Americans, 86.5% of those surveyed, believe that physicians should not have the power to remove organs from people who have died and have not signed an organ donor card, without first consulting next of kin. Manninen and Evans, "Public Attitudes and Behavior Regarding Organ Donation," 253 Journal of the American Medical Association 3111, 3114 (1985).

not fundamental, they nevertheless exist, and are therefore protected by procedural due process requirements. The court did not reach the question of what process was due because it found that next of kin have no constitutionally protected rights in the remains of their dead family members. A.28. This conclusion is at odds with logic and common experience. Petitioners rights in their dead children's remains, however they are characterized,[12] are sufficient to trigger the procedural protections of the due process clause.

Here, rights arise not only from the relationship between the decedent and the

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12. Paradoxically, the court recognized that the moral, ethical, theological, philosophical and economic concerns implicated here "do not readily lend themselves to analysis in a traditional legal framework," A.29, but nevertheless rejected the claim that petitioners had rights in the remains through the mechanical application of traditional concepts of liberty and property.

next of kin, but also from the language of the cornea removal statute itself, which provides that corneas can be taken where "[n]o objection by the next of kin is known by the medical examiner." Section 732.9185, Florida Statutes. Although it was not read that way below, the statute clearly recognizes a right to object, and that right is protected by due process of law.[13]

There is no question on this record that respondents failed to satisfy the requirements of notice and opportunity to

13. It is well established that liberty interests may arise from state law. Vitek v. Jones, 445 U.S. 480, 488-91 (1980)(state law afforded prisoner liberty interest in avoiding transfer to mental hospital absent fulfillment of specified standards); Morrissey v. Brewer, 408 U.S. 471, 480-82 (1972)(state law granted prisoner conditional liberty interest in parole); Wright v. Enomoto, 462 F.Supp. 397, 402-03 (N.D. Cal. 1976) aff'd sub. nom. Enomoto v. Wright, 434 U.S. 1052 (1978)(state law granted prisoner liberty interest when transferred to solitary confinement for disciplinary or administrative reasons).

be heard imposed by the due process clause. Goldberg v. Kelly, 397 U.S. 254 (1970). It is undisputed that petitioners were never given any notice of the proposed removal, despite the fact such notice could easily have been given.

The record clearly indicates that the medical examiner's failure to notify the Powells and the Whites was not inadvertent.[14] It was the result of a deliberate policy of the medical examiner to fail and refuse to notify next of kin that removal is imminent to assure that

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14. The Powells were kept waiting in an adjoining room while their son's corneas were taken and were never told of the impending removal or asked if they had an objection. Mr. White objected to an autopsy, a fact which would reasonably alert the medical examiner or his designee to the family's objections to the removal of the corneas. Nevertheless, he was never told that his child's corneas were going to be taken, although he could have easily been told. A.45-46;61-62;63-65.

they will be denied a real opportunity to make their objections known.[15]

The questions presented call into question the constitutionality of a statute which has been adopted, with minor variations, in close to a dozen states.[16] States which have not yet adopted such statutes will consider adopting them in the future. Therefore, the questions presented here are of great significance throughout the nation and should be resolved by this Court.

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15. The trial court found that:
> it is the policy of the Office of the Medical Examiner not to solicit objection to cornea removal or to advise the next of kin of the intent to remove corneae.

A.65.

16. Statutes which allow the removal of corneas if there is no known objection have been adopted in California, Connecticut, Delaware, Florida, Georgia, Kentucky, Maryland, Michigan, Ohio, Texas and West Virginia. The text of these statutes can be found in the Appendix, beginning at A.79.

Respectfully Submitted,

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In The
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WADE POWELL AND FREDA POWELL, HIS WIFE, AND ERWIN WHITE AND SUSAN WHITE, HIS WIFE,
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v.

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZ, M.D., KEITH GAUGER, THOMAS M. TECHMAN, NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION,
Respondents.

APPENDIX TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

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MARCH 20, 1987

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Order, State of Florida, Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc., Florida Lions Eye Bank, Inc., William H. Shutze, M.D. Thomas M. Techman, M.D. and Keith Gauger v. Wade Powell and Freda Powell, Nos. 85-1354 & 85-1380, (5th District Ct. of FL), October 9, 1985 . . . . . A-54

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STATE of Florida, et al., Appellants,

v.

Wade POWELL, et ux, et al.,Appellees.

CASE NO. 67755.

Supreme Court of Florida.

Oct. 30, 1986.

Rehearing Denied Dec. 22, 1986.

Petition was filed to review an order of the Circuit Court, Marion County, William T. Swigert, J., finding unconstitutional statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when the tissue is needed for transplantation. The District Court of Appeal certified that the case presented a question requiring immediate resolution. The Supreme Court, Overton, J., held that statute rationally promotes

permissible state objective of restoring sight to the blind and is thus constitutional.

Reversed and remanded.

Shaw, J., filed a dissenting opinion.

1. Dead Bodies 1

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation rationally promotes permissible state objective of restoring sight to the blind and is thus constitutional. West's F.S.A. 732.9185.

2. Eminent Domain 1(1.1)

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation does not effect taking of private

property by state action for nonpublic purpose in violation of State Constitution. West's F.S.A. Const. Art. 5, 3(b)(5); Art. 10, 6; West's F.S.A. 732.9185.

3. Constitutional Law 82(6)

Right of next of kin to tort claim for interference with burial does not rise to constitutional dimension of fundamental right traditionally protected by Constitution.

4. Constitutional Law 225.1
Dead Bodies 1

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation does not create invidious classification regarding next of kin of deceased persons, and thus, does not violate equal protection clause. West's

F.S.A. 732.9185; West's F.S.A. Const. Art. 5 3(b)(5); U.S.C.A. Const. Amend. 14.

Jim Smith, Atty. Gen and Kenneth McLaughlin, Asst. Atty. Gen., Tallahassee, for State of Florida.

Alan C. Sundberg, George N. Meros, Jr. and F. Townsend Hawkes of Carlton, Fields, Ward, Emmanuel, Smith and Cutler, Tallahassee, for Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc., and Florida Lions Eye Bank, Inc.

Andrew G. Patillo, Jr. and Russell W. LaPeer of Patillo and McKeever, Ocala, for William H. Shutze, M.D., Thomas M. Techman, M.D., and Keith Gauger.

Craig A. Dennis of Perkins & Collins, Tallahassee, for Florida Society of Ophthalmology, Inc.

Donald W. Weidner, Associate Gen. Counsel, Jacksonville, for Florida Medical Association, Inc.

Robert A. Ginsburg, Dade Co. Atty. and Robert L. Blake, Asst. Co. Atty., Public Health Division, Jackson Memorial Hospital, Miami, for Dade County, intervener.

Jerome J. Bornstein and Mark P. Lang, Staff Counsel, American Civil Liberties, Orlando, and Stephen T. Maher, American Civil Liberties Union Foundation of Florida, Inc., University of Miami School of Law, Coral Gables, for Wade Powell and Freda Powell.

James T. Reich, and Jack Singbush of Jack Singbush, P.A., Ocala, for Erwin White and Susan White.

Frederick H. von Unwerth of Kilpatrick & Cody, Washington, D.C., for

the Eye Bank Association of America, Inc., amicus curiae.

Melinda L. McNichols of Arky, Freed, Stearns, Watson, Greer and Weaver, P.A., Miami, for Reverend Thomas J. Price, amicus curiae.

Benedict P. Kuehne of Bierman, Sonnett, Shohat and Sale, P.A., Miami, for the Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, PH.D., amicus curiae.

OVERTON, Justice.

This is a petition to review a circuit court order finding unconstitutional section 732.9185, Florida Statutes (1983), which authorizes medical examiners to remove corneal tissue from decedents during statutorily required autopsies when such tissue is needed for transplantation. The statute prohibits

the removal of the corneal tissue if the next of kin objects, but does not require that the decedent's next of kin be notified of the procedure. The Fifth District Court of Appeal certified that this case presents a question of great public importance requiring immediate resolution by this Court. We accept jurisdiction pursuant to article V, section 3(b)(5), Florida Constitution, and, for the reasons expressed below, find that the statute is constitutional.

The challenged statute provides:

Corneal removal by medical examiners.-

(1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank autho-

rized under s. 732.918, provide the cornea of a decedent whenever all of the following conditions are met:

> (a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance with s. 406.11.
>
> (b) No objection by the next of kin of the decedent is known by the medical examiner.
>
> (c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.

(2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under s. 732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

The trial court decided this case by summary judgment. The facts are not in dispute. On June 15, 1983, James White drowned while swimming at the city beach

in Dunellon, Florida. Associate medical Examiner Dr. Thomas Techman, who is an appellant in this cause, performed an autopsy on James' body at Leesburg Community Hospital. On July 11, 1983, Anthony Powell died in a motor vehicle accident in Marion County. Medical Examiner Dr. William H. Shutze, who is also an appellant in this cause, performed an autopsy on Anthony's body. In each instance, under the authority of section 732.9185, the medical examiner removed corneal tissue from the decedent without giving notice to or obtaining consent from the parents of the decedent.

James' and Anthony's parents, who are the appellees in this case, each brought an action claiming damages for the alleged wrongful removal of their sons' corneas and seeking a judgment declaring section 732.9185 unconstitu-

tional.[1] The actions were subsequently consolidated.

In its judgment, the trial court noted that section 732.9185 "has as its purpose the commendable and laudable objective of providing high quality corneal tissue to those in need of same," but declared the statute unconstitutional on the grounds that it (1) deprives survivors of their fundamental personal and

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1. The Whites named as defendants Shutze, Techman, Keith Gauger, who is an investigator for the medical examiner's office in that district, and the State of Florida. The Powells named as defendants Shutze and the Monroe Regional Medical Center. Dade County, The Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc., Florida Lions Eye Bank, Inc., Florida Medical Association, Inc., Florida Society of Ophthalmology, Inc., and Eye Bank Association of America, Inc., were each permitted to intervene as parties in support of the constitutionality of section 732.9185. The Reverend Thomas J. Price of the Florida Conference of United Methodist Churches and the Rabbinical Association of Greater Miami filed amicus briefs in support of the appellees' position.

property right to dispose of their deceased next of kin in the same condition as lawful autopsies left them, without procedural or substantive due process of law;(2) creates an invidious classification which deprives survivors of their right to equal protection; and (3) permits a taking of private property by state action for a non-public purpose, in violation of article X, section 6(a), of the Florida Constitution. The court concluded that the state has no compelling interest in non-consensual removal of appellees' decedents' corneal tissue that outweighs the survivors' right to dispose of their sons' bodies in the condition death left them.[2] For the reasons expressed below, we reject these findings.

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2. The appellees also challenged as unconstitutional 406.11, Fla. Stat.(1983), which provides medical examiners with the authority to perform autopsies under circumstances enumerated in the statute. The trial court upheld

In addressing the issue of the statute's constitutionality, we begin with the premise that a person's constitutional rights terminate at death. See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147(1973); Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir.1980), cert. denied, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981); Guyton v. Phillips, 606 F.2d 248 (9th Cir.1979), cert. denied, 445 U.S. 916, 100 S.Ct. 1276, 63 L.Ed.2d 600 (1980). If any rights exist, they belong to the decedent's next of kin.

Next, we recognize that a legislative act carries with it the presumption of a validity and the party challenging a statute's constitutionality must carry the burden of establishing that the

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that statutory provision, and that finding is not challenged in this proceeding.

statute bears no reasonable relation to a permissible legislative objective. Johns v. May, 402 So.2d 1166 (Fla. 1981). See also Harrah Independent School District v. Martin, 440 U.S. 194, 198, 99 S.Ct. 1062, 1064, 59 L.Ed.2d 248 (1979). In determining whether a permissible legislative objective exists, we must review the evidence arising from the record in this case.

The unrebutted evidence in this record establishes that the State of Florida spends approximately $138 million each year to provide its blind with the basic necessities of life. At present, approximately ten percent of Florida's blind citizens are candidates for cornea transplantation, which has become a highly effective procedure for restoring sight to the functionally blind. As advances are made in the field, the number

of surgical candidates will increase, thereby raising the demand for suitable corneal tissue. The increasing number of elderly persons in our population has also created a great demand for corneas because corneal blindness often is age-related. Further, an affidavit in the record states:

> Corneal transplants are particularly important in newborns. The brain does not learn to see if the corneal is not clear. there is a critical period in the first few months of life when the brain "learns to see." If the cornea is not clear, the brain not only does not "learn to see," but the brain loses its ability to "learn to see." Hence, corneal transplant in children must be made as soon as practicable after the problem is discovered. Without the medical examiner legislation, there would be virtually no corneal tissue available for infants and these children would remain forever blind.

The record reflects that the key to successful corneal transplantation is the

availability of high-quality corneal tissue and that corneal tissue removed more than ten hours after death is generally unsuitable for transplantation. The implementation of section 732.9185 in 1977 has, indisputably, increased both the supply and quality of tissue available for transplantation. Statistics show that, in 1976, only 500 corneas were obtained in Florida for transplantation while, in 1985, more than 3,000 persons in Florida had their sight restored through corneal transplantation surgery.

The record also demonstrates that a qualitative difference exists between corneal tissue obtained through outright donation and tissue obtained pursuant to section 732.9185. In contrast to the tissue donated by individuals, which is largely unusable because of the advanced age of the donor at death, approximately

eighty to eighty-five percent of tissue obtained through medical examiners is suitable for transplantation. The evidence establishes that this increase in the quantity and quality of available corneal tissue was brought about by passage of the statute and is, in large part, attributable to the fact that section 732.9185 does not place a duty upon medical examiners to seek out the next of kin to obtain consent for cornea removal. An affidavit in the record reveals that, before legislation authorized medical examiners in California to remove corneas without the consent of the next of kin, the majority of the families asked by the Los Angeles medical examiner's office responded positively; however, approximately eighty percent of the families could not be located in sufficient time

for medical examiners to remove usable corneal tissue from the decedents.

An autopsy is a surgical dissection of the body; it necessarily results in a massive intrusion into the decedent. This record reflects that cornea removal, by comparison, requires an infinitesimally small intrusion which does not affect the decedent's appearance. With or without cornea removal, the decedent's eyes must be capped to maintain a normal appearance.

Our review of section 732.9185 reveals certain safeguards which are apparently designed to limit cornea removal to instances in which the public's interest is greatest and the impact of the next of kin the least: corneas may be removed only if the decedent is under the jurisdiction of the medical examiner; an autopsy is mandated by Florida law; and the

removal will not interfere with the autopsy or an investigation of the death. Further, medical examiners may not automatically remove tissue from all decedents subject to autopsy; rather, a request must be made by an eye bank based on a present need for the tissue.

[1] We conclude that this record clearly establishes that this statute reasonably achieves the permissible legislative objective of providing sight to many of Florida's blind citizens.

We next address the trial court's finding that section 732.9185 deprives appellees of a fundamental property right. All authorities generally agree that the next of kin have no property right in the remains of a decedent. Although, in Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941), this Court held that a surviving husband had a "property

right" in his wife's body which would sustain a claim for negligent embalming id. at 183, 200 So. at 542, we subsequently clarified our position to be consistent with the majority view that the right is limited to "possession of the body . . . for the purpose of burial, sepulture or other lawful disposition," and that interference with this right give rise to a tort action.[3] Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla.1950). More recently, we affirmed the district court's determination that the next of kin's right in a decedent's remains is

3. The American Law Institute sets forth the tort of interfering with the "right of burial" as follows: One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." Restatement (Second) of Torts 868 (1979).

based upon "the personal right of the decedent's next kin to bury the body rather than any property right in the body itself." Jackson v. Rupp, 228 So.2d 916, 918 (Fla. 4th DCA 1969) affirmed, 238 So.2d 86 (Fla.1970). The view that the next of kin has no property right but merely a limited right to possess the body for burial purposes is universally accepted by courts and commentators. See Lawyer v. Kernodle, 721 F.2d 632 (8th Cir.1983); Sinai Temple v. Kaplan, 54 Cal.App.3d 1103, 127 Cal. Rptr. 80 (1976); Dougherty v. Mercantile-Safe Deposit & Trust Co., 282 Md. 617, 387 A.2d 244 (Ct.App. 1978); Finn v. City of New York, 70 Misc.2d 947, 335 N.Y.S.2d 516 (Civ. Ct.1972), rev'd on other grounds, 76 Misc.2d 388, 350 N.Y.S.2d 552 (Sup.Ct.1973); Sullivan v. Catholic Cemeteries, Inc., 113 R.I. 65, 317 A.2d

430 (1974); Sadler & Sadler, "Transplantation and the Law: The Need for Organized Sensitivity," 57 Geo. L.J. 5 (1968); Sanders & Dukeminier, "Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation," 15 U.C.L.A.L.Rev. 357 (1968). Prosser states:

> A number of decisions have involved the mishandling of dead bodies . . . . In these cases the courts have talked of a somewhat dubious "property right" to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such a "property" is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer.

W. Prosser, The Law of Torts, 43-44 (2d ed. 1955) (footnotes omitted). The

Maryland Court of Appeals has summarized the law as follows:

> It is universally recognized that there is no property in a dead body in a commercial or material sense. [I]t is not part of the assets of the estate (though its disposition may be affected by the provision of the will); it is not subject to replevin; it is not property in a sense that will support discovery proceedings; it may not be held as security for funeral costs; it cannot be withheld by an express company, or returned to a sender, where shipped under a contract calling for cash on delivery; it may not be the subject of a gift causa mortis; it is not common larceny to steal a corpse. Rights in a dead body exist ordinarily only for purposes of burial and except with statutory authorization, for no other purpose." Snyder v. Holy Cross Hosp., 30 Md.App. 317 at 328 n.12, 352 A.2d 334 at 340, quoting P.I. Jackson, The Law of Cadavers and of Burial and Burial Places (2d ed. 1950).

Dougherty, 282 Md. at 620 n.2, 387 A.2d at 246 n.2.

[2] Under the facts and circumstances of these cases, we find no taking

of private property by state action for a non-public purpose in violation of article X, section 6, of the Florida Constitution. We note that the right to bring an action in tort does not necessarily invoke constitutional protections. Decisions of the United States Supreme court have clearly established that the loss of a common law right by legislative act does not automatically operate as a deprivation of substantive due process. Tort actions may be restricted when necessary to obtain a permissible legislative objective. See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32 57 L.Ed.2d 595 (1978).

[3] Appellees also assert that their right to control the disposition of their decedents' remains is a fundamental

right of personal liberty protected against unreasonable governmental intrusion by the due process clause. Appellees argue that, because the statute permits the removal of a decedent's corneas without reference to his family's preferences, it infringes upon a right, characterized as one of religion, family, or privacy, which is fundamental and must be subjected to strict scrutiny. Appellees rely upon a line of decisions from the United States Supreme Court which recognize the freedom of personal choice in matters of family life as one of the liberties protected by the due process clause. See, e.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed2d 147 (1973); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d

15 (1972). Appellees also point out that the United States Supreme Court has found rights to personal privacy in connection with activities relating to marriage, Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); procreation, Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); contraception, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2nd 510 (1965); abortion, Roe v. Wade; and childrearing and education, Pierce v Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). According to appellees, the theme which runs through these cases, and which compels the invalidation of section 732.9185, is the protection from governmental interference of the right of free choice in decisions of fundamental importance to the family.

We reject appellees' argument. The cases cited recognize only freedom of choice concerning personal matters involved in existing, ongoing relationships among living persons as fundamental or essential to the pursuit of happiness by free persons. We find that the right of the next of kin to a tort claim for interference with burial, established by this Court in Dunahoo, does not rise to the constitutional dimension of a fundamental right traditionally protected under either the United States or Florida Constitution. Neither federal nor state privacy provisions protect an individual from every governmental intrusion into one's private life, see Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla.1983), especially when a statute addresses public health interests. Whalen v. Roe, 429 U.S. 589, 97 S.Ct.

869, 51 L.Ed2d 64 (1977) (state accorded wide latitude in constitutional privacy terms to safeguard health); Roe v. Wade (review less exacting when state asserts effort to safeguard health).

The record contains no evidence that the appellees' objections to the removal of corneal tissues for human transplants are based on any "fundamental tenets of their religious beliefs." Wisconsin v. Yoder, 406 U.S. at 218, 92 S.Ct. at 1534. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." Id. at 215-16, 92 S.Ct. at 1533.

[4] We also reject the trial court's finding that section 732.9185 creates an invidious classification regarding the next of kin of deceased

persons. "Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others." Parham v. Hughes, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 264 (1979). We find that the statute's effect on the next of kin is incidental and does not offend equal protection.

In view of our finding that the appellees have no protectable liberty or property interest in the remains of their decedents, we need not address the argument that section 732.9185 violates procedural safeguards guaranteed by the due process clause. See Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

In conclusion, we hold that section 732.9185 is constitutional because it rationally promotes the permissible state

objective of restoring sight to the blind.[4] In so holding, we note that laws regarding the removal of human tissues for transplantation implicate moral, ethical, theological, philosophical, and economic concerns which do not readily lend themselves to analysis within a traditional legal framework. Applying constitutional standards of review to section 732.9185 obscures the fact that at the heart of the issue lies a policy question which calls for a delicate balancing of societal needs and individual concerns more appropriately accomplished by the legislature.

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4. Courts in Georgia and Michigan have upheld the constitutionality of cornea removal statutes similar to Florida's. See Georgia Lions Eye Bank, Inc., v. Lavant, 255 Ga. 60, 335 S.E.2d 127 (1985), cert. denied, ___U.S.___, 106 S.Ct.1464, 89 L.Ed.2d 721 (1986); Tillman v. Detroit Receiving Hospital, 138 Mich.App. 683, 360 N.W.2d 275 (1984).

For the reasons expressed, we reverse the trial court's order and remand this cause to the trial court with directions to enter judgment consistent with this opinion.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, EHRLICH and BARKETT, JR., concur.

SHAW, J., dissents with an opinion.

SHAW, Justice, dissenting.

Before setting out my disagreements with the substance of the majority opinion, it is necessary to first clarify the procedural posture of these cases.

The Whites brought a complaint in four counts against appellants Gauger, Techman and Shutze concerning the circumstances surrounding an autopsy and cornea removal performed on their teenage son following his accidental drowning on 15 June 1983. Techman and Shutze are medi-

cal doctors and, respectively, an assistant medical examiner and the medical examiner in the Fifth Judicial Circuit. Gauger is a non-medical investigator in Marion County. As amended in four counts, the complaint alleges, inter alia, as follows. Count I alleges that the Whites had objected to the autopsy and any alteration of their son's body; that no cause of death other than accidental drowning was reasonable in that five persons, including an off-duty highway patrolman, had witnessed the drowning; that appellant Shutze had established a policy and mechanism for performing autopsies on all drowning victims contrary to section 406.11, Florida Statutes (1981); that decisions on autopsies in Marion County are made by Gauger, a private employee of Shutze & Techman P.A., who obtains and transports bodies

to Lake County where autopsies are performed; that appellant Shutze permitted Gauger to falsely represent himself as a member of the medical examiner's staff; that Shutze & Techman P.A. performed autopsies on a piecework basis and directly benefited from the number of autopsies performed; that the autopsy was performed contrary to section 872.04, Florida Statutes (1981); that appellant Gauger was untrained in ophthalmology and unqualified to be designated under section 732.9185, Florida Statutes (1981), as a person to provide corneas; that conditions precedent to removal of corneas under section 732.9185 were not met; and that the Whites have suffered damages by reason of extreme mental pain and anguish for which compensatory and punitive damages should be paid. Counts II and III are actions pursuant to chapter 86,

Florida Statutes (1981), seeking declaratory judgments as to the Whites' rights, duties, and privileges under sections 732.9185 and 406.11 which allege that both sections are unconstitutional both facially and as applied. Count IV is an action alleging violation of civil rights under Title 42, U.S.C. 1983 and the United States Constitution.

The Powells also brought a complaint in four counts against appellants Shutze and Monroe Regional Medical Center (MRMC) concerning the autopsy and cornea removal performed on their twenty-year-old son following his death in a single vehicle accident on 11 July 1983. Count I alleges that appellants performed an arbitrary, capricious and unlawful autopsy and removed corneas without meeting the conditions precedent of section 732.9185. Count II alleges that section 732.9185 is

facially unconstitutional and directly contrary to section 732.910, et seq., Florida Statutes (1981). Counts III and IV allege mental anguish and financial loss caused by, respectively, appellants Shutze and MRMC.

The two cases were consolidated and came before the trial judge on motions for summary judgment. In order under appeal, the trial judge found that section 406.11 was constitutional on its face and as applied, but that section 732.9185 was facially unconstitutional. The trial judge did not rule on a motion that section 732.9185 was unconstitutional as applied. The order comes directly to us on the certification of Fifth District Court of Appeal that it contains a question of great public importance which requires immediate resolution.

The only question legitimately before us is whether the trial court erred in granting a summary judgment that section 732.9185 is facially unconstitutional. In the present posture of the case, we are not presented with the issues of whether sections 406.11 and 732.9185 were complied with in performing these autopsies and cornea removals, of whether the two sections have been constitutionally applied, of whether any or all of the appellants are liable, and of the Whites' rights, duties and privileges under section 406.11 and 732.9185. Without specifying that it is addressing the narrow issue of the facial constitutionality of section 732.9185, the majority opinion addresses a wide range of issues which are only tenuously related to the narrow issue before us. The majority then reverses and remands with directions

that a judgment for appellants (defendants) be entered. In my view this disposition is completely premature. My review of the record indicates there are substantial questions of material fact which preclude entry of summary judgments for the defendants.

The thrust of the majority opinion appears to be that the state and its agents have an unqualified right to the body of a decedent provided at some point the remains are turned over to the next of kin. I do not believe this is the law. I am persuaded, as was the trial judge below, that since time immemorial it has been the duty and the right of the next of kin to take control, possession, and custody of the body and remains of a deceased family member. These duties and rights, predicated on religious, moral, and philosophical grounds, were recog-

nized at common law and were not totally surrendered to the state when our constitutions were adopted. These rights are not only reserved to the people under article I, section 1 of the Florida Constitution, but are affirmatively protected as religious, liberty, and privacy rights under article I, sections 3, 9, and 23 and by various statutes of the state.

The scope of the common law and the rights retained by the people should not, in my view, be narrowly construed. As the United States Supreme Court has said:

> What is the common law? According to Kent: "The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of will of the legislature." 1 Kent, Com.471. As Blackstone says: "Whence it is that in our law the goodness of a custom depends upon its having

been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this Kingdom. This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole Kingdom, and form the common law, in its stricter and more usual signification." 1. Bl.Com. 67. In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislature, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92 101-02, 21 S.Ct. 561, 564, 45 L.Ed. 765 (1901) (emphasis

supplied). The right to privacy under section 23 is particularly pertinent in my view because the right to be let alone and to be free from government intrusion into private life is, in large part, simply a constitutional affirmation of common law rights and customs surrounding the exercise of private, as contrasted to public, liberties. The right to possess and control the body of a deceased loved one and to honor and celebrate the decedent's life and death through appropriate commemoration is a quintessential privacy right.

These personal rights of the next of kin are qualified only by the overriding police power of the state to regulate the care and disposition of dead bodies for the protection of public health and welfare. I have no doubt that the state may require an autopsy when there is a

founded suspicion that death was by criminal action, when there is a likelihood that the death was caused by a communicable disease, or, even, when the death is simply inexplicable and the cause needs to be determined. I do not agree that the agents of the state may be constitutionally granted carte blanche to conduct autopsies based on whim, bureaucratic convenience, curiosity, pecuniary gain, or "policy." A significant question of material fact is whether the agents exceeded their statutory authority and we should have this issue resolved before we address the constitutionality of the statutes. The record consists largely of a series of depositions and affidavits taken or given in connection with the Whites' complaint and with the motions for summary judgments. The Powells' complaint was filed well after

the Whites' complaint and contains little of record.

The assistant state attorney assigned to Marion County was deposed and testified as follows regarding the policy of performing autopsies. He was of the opinion that autopsies should be conducted on all drowning and vehicle accident victims and had communicated this policy to the medical examiner and law enforcement personnel. Autopsies were necessary even if there was no suggestion of criminal culpability or doubt about the cause of death. Autopsies were needed in case there were civil suits arising from the death and were important to insurance companies, families, and anyone who might have an interest in the facts. He did not believe the medical examiner had discretion to forego and autopsy when one of the enumerated cir-

cumstances of section 406.11 existed, for example, an accidental death. He had conducted an investigation into the cornea removals from decedent White and found the removals were performed on the authority of the investigator, appellant Gauger. Further, in his opinion, there had been an objection by the White family to the removal of the corneas prior to their removal.

The medical examiner, appellant Shutze, recited the following in two affidavits. It is the policy of the medical examiner's office to perform full autopsies on all persons who die in Marion County by accident, including, specifically, drowning or motor vehicle accidents. The medical examiner bases this policy on section 406.11 and the request of the state attorney's office. The purposes of autopsies are to (1) de-

termine cause of death, (2) identify health or safety hazards, (3) obtain evidence of criminal conduct, and (4) advance the understanding of medical science. Appellant Gauger is an investigator working for appellant Shutze's professional association; he is not an employee of the medical examiner's office. Appellant Gauger has been instructed to notify the medical examiner's office of all deaths in Marion County. Appellant Gauger is the medical examiner's authorized designee for Marion County under section 732.9185. The medical examiner or an assistant medical examiner makes the final decision on whether an autopsy should be performed in each specific instance. Appellant Techman performed the autopsy on the Whites' decedent and appellant Shutze performed the autopsy on the Powells' decedent. Objections to

autopsies are considered but the final decision is made by the medical examiner or assistant medical examiner. Objections to cornea removals are not solicited but are honored if known. Eye bank personnel, not the medical examiner's office, determine the suitability of corneas for transplant.

The assistant medical examiner, appellant Techman, in an affidavit recited statements on the general policy and practices of the medical examiner's office which parallel those appellant Shutze. In addition, appellant Techman recited that he performed the White autopsy and signed the death certificate. He alone made the decision to perform the autopsy, relying on policy, section 406.11, and the request of the state attorney's office. He had no police report available and his only knowledge of the

circumstances surrounding the death was based on the investigator's report by appellant Gauger. The report reflected the contact with the family but did not indicate any objection to an autopsy. Had there been any, he would nevertheless have performed the autopsy. He had no knowledge that the corneas were going to be removed, did not authorize their removal, and learned of their removal for the first time when he began the autopsy.

Appellee White was deposed and testified as follows. He was called to the hospital where his son's body had been taken and met with appellant Gauger. He never met or talked with appellants Shutze and Techman. Appellant Gauger told him that the son's death was a simple accidental drowning with no suggestion of foul play. However, he was told state law required an autopsy be per-

formed and that the body was to be shipped to another county for that autopsy. Appellee White objected strenuously to the autopsy but believed he had no recourse under the law and asked that the intrusion be kept to a minimum. Appellant Gauger told him it would only be necessary to make a small incision into the chest to probe the lungs. Nothing was said of cornea removal and he only learned of it when he viewed his sons's body at the funeral home following the return of the body after the autopsy. The body's eyes, particularly the right eye, were noticeably sunken into the skull. The funeral director explained this sunken condition of the eyes as caused by the cornea removal.

The record also contains minor corrections to a deposition by appellant Gauger. However, the deposition itself

is not contained in the record. This deposition could be highly significant in that appellant Gauger appears to be the central figure in these episodes.

Attempting to recount all of the significant questions of material fact which appear on the face of this record would be excessively burdensome and would be of little benefit at this stage of the proceedings. Moreover, any list would likely be incomplete. It is appropriate, however, to refer to several as illustrative of the issues not yet addressed. The two overarching issues are, first, whether the policies and practices of the medical examiner's office followed in these two cases are consistent with the provisions of sections 406.11 and 732.9185. Second, assuming the statutes were complied with, were they constitutionally applied. Section 925.09,

Florida Statutes (1981), authorizes the state attorney to have an autopsy performed when "it is necessary in determining whether or not death was the result of a crime." Two significant questions of material fact engendered by this section are whether these two autopsies, and accompanying cornea removals, were performed under the authority of the state attorney, and, if so, was that authority legally exercised. Section 406.11(1) authorizes the medical examiner to perform such autopsies as he deems necessary to determine the cause of death. An additional question of material fact is whether the medical examiner's office has a policy or practice of performing autopsies on all accident victims, specifically drowning and vehicle accident victims. In this connection, I note also section 872.01, Florida Statutes (1981),

titled Dealing in dead bodies; section 872.04, Florida Statutes (1981), titled Autopsies; consent required, exception; and chapter 936, Florida Statutes (1981), titled Inquests of the Dead. Significant questions of material fact also arise in connection with section 732.9185. Two general questions, with numerous subsidiary questions, are whether the conditions precedent to cornea removal were present and whether the provisions of section 732.9185 were followed. The issue of the constitutionality of sections 406.11 and 732.9185, as applied, is inchoate at this stage of the proceeding.

The legislature is apparently of the view, contrary to the majority, that a decedent's next of kin have the right to possess and control the decedent's body and that both the decedent and next of kin may control the removal and donation

of human organs. The various provisions of chapter 245, Florida Statutes (1981), titled Disposition of Dead Bodies, are grounded on the right of the next of kin may control and possession of dead bodies. Section 245.07 appears to rule out the state's use of dead bodies for the advancement of medical science unless the bodies are unclaimed or donated under section 245.11.[5] On the question of the donation and removal of organs, chapter 732, part X, Florida Statutes (1985), authorizes and establishes programs whereby both the decedent and survivors may donate organs of a decedent. Section 732.912 is particularly pertinent. Sub-

5. This does not mean that medical science may not be advanced as a by-product of autopsies which are legally conducted for other reasons under 406.11. It does suggest, however, that advancement of medical science, without more, is not legal justification for conducting an autopsy on bodies which come into the hands of the medical examiner.

section (1) authorizes the donation of organs by will; subsection (2) authorizes the donation of a decedent's organs by next of kin in a priority order and also recognizes the right of next of kin to veto the removal or donation of organs. Moreover, section 732.9185(1)(b) itself recognizes the right of the next of kin to veto the donation of the cornea.[6] The crucial point is that part X of chapter 732 is grounded on the right of the decedent and next of kin to control the removal and disposition of organs taken

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6. Section 732.9185(1)(b) states: "[n]o objection by the next of kin of the decedent is known by the medical examiner." Subsection (2) provides that the medical examiner will not be held liable for "failure to obtain consent of the next of kin." The words "failure to obtain" suggest an unsuccessful effort. These provisions are apparently being interpreted as authority not to seek consent from next of kin who are physically present and readily available to grant or deny consent. is that the legislative intent? The trial court should hear arguments and address this point.

from the body of the decedent. If this is not so, part X is grounded on air. It is a conundrum in that it is simply not legally possible nor permissible to donate or control the donation of an article which does not belong to the donor.

I agree that these cases present issues of great public importance which may, at some point, require this Court's attention. At this point, however, there is substantial doubt that sections 406.11 and 732.9185 have been correctly interpreted and applied by the cognizant authorities in Marion County. The issues presented by these suits, particularly the counts requesting a declaratory judgment of the rights, duties, and privileges of the next of kin, are likely to be with us a long time and to become even more intense as medical science advances and organ transplants increase in

number. I am simply not prepared to rush to judgment on issues as important as these based on a summary judgment. These issues are important, but we are not a legislative body rushing to enact emergency legislation to meet an urgent state need before the end of a legislative session. These cases should be remanded with instructions that the trial go forward and a record be developed.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE FLORIDA
FIFTH DISTRICT

STATE OF FLORIDA, MEDICAL EYE BANK, INC., NORTH FLORIDA LIONS EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., WILLIAM H. SHUTZE, M.D., THOMAS M. TECHMAN, M.D. and KEITH GAUGER,

Appellants,

v. CASE NOs. 85-1354 & 85-1380

WADE POWELL AND FREDA POWELL, his wife, et al.,

Appellees.

DATE: October 9, 1985

BY ORDER OF THE COURT:

The Appellants herein seek review of an order of the Circuit Court for Marion County, Florida, declaring uncon-

stitutional Section 732.9185, Florida Statutes (Corneal Removal Law), which authorizes district medical examiners to remove corneal tissue for transplant purposes. The Appellants allege that the lower court's ruling has had a deterrent effect on district medical examiners willingness to provide transplant cornea which will effectively decrease both the supply and quality of corneal tissue available for transplantation. Whether the corneal removal law is constitutional or unconstitutional requires immediate resolution by the Florida Supreme Court. Accordingly it is

ORDERED that the MOTION TO CONSOLIDATE, filed September 23, 1985, is granted and the above-styled appeals are hereby consolidated for future appellate purposes. It is further

ORDERED that this Court hereby certifies that the constitutionality of Section 732.9185, Florida Statutes, is an issue of great public importance and one which will have a great effect on the proper administration of justice throughout the state. Accordingly, this Court requests the Supreme Court of Florida to accept jurisdiction of this cause pursuant to Florida Rule of Appellate Procedure 9.125.

I hereby certify the foregoing is (a true copy of) the original court order.

FRANK J. HABERSHAW

By:_____Deputy Clerk

IN THE CIRCUIT COURT, FIFTH JUDICIAL
CIRCUIT OF FLORIDA, IN AND FOR
MARION COUNTY.
CIVIL DIVISION

WADE POWELL and FREDA
POWELL, his wife,

Plaintiffs,

vs. CASE NO. 84-2025 B

MUNROE REGIONAL MEDICAL
CENTER, et al.,

Defendants.

----------(Consolidated)

ERWIN WHITE, et ux.,

Plaintiffs,

vs. CASE NO. 83-2790 B

KEITH GAUGER, et al.,

Defendants.

_____/

ORDER ON MOTIONS FOR SUMMARY JUDGMENT
WHITE, et ux. v. SHUTZE, et al.
POWELL et ux. v. MUNROE REGIONAL
MEDICAL CENTER, et al.

THIS CAUSE came on to be heard pursuant to the following motions in Case No. 83-2790-b.

1. Plaintiffs' ERWIN WHITE and SUSAN WHITE MOTION FOR PARTIAL SUMMARY JUDGMENT on the facial Constitutionality of Section 732.9185, Florida Statutes.

2. Defendants' SHUTZE, TECHMAN and GAUGER motions for Summary Judgment on all counts and issues raised in the pleadings as follows:

a. Facial constitutionality of Section 406.11, Florida Statutes, hereinafter referred to as the "Medical Examiner's Act."

b. Facial constitutionality of Section 732.9185, hereinafter referred to as the "Cornea Removal Statute."

c. Constitutionality of Section 406.11, Florida Statutes, as applied in this case.

d. Constitutionality of Section 732.9185, Florida Statutes, as applied in this case.

e. Liability of Defendants for damages as alleged in COUNT I of the SECOND AMENDED COMPLAINT.

3. Intervenors' MOTION FOR SUMMARY JUDGMENT on the facial constitutionality of Section 732.9185.

THIS CAUSE came on to be heard pursuant to the following Motions in Case No. 84-2025-B:

1. Plaintiffs WADE POWELL and FREDA POWELL'S Motion for Summary Judgment and the Defendants and Intervenor's Motion for Summary Judgment as to the constitutionality of Florida Statutes 732.9185.

AND after considering the respective motions, the Memoranda of Law submitted by the parties and intervenors, the affi-

davits and depositions on file and after hearing arguments of counsel and being otherwise duly advised in the premises, upon consideration thereof the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On June 15, 1983, James E. white, age 15, drowned while swimming in the Rainbow River at the Dunnellon City Beach in Marion County, Florida.

2. Plaintiffs Erwin and Susan White are the surviving parents and next of kin of James E. White.

3. The body of James E. White was taken to Munroe Regional Medical Center in Ocala, Florida, where Defendant Keith Gauger, an investigator for the Medical Examiner's Office for the Fifth Medical Examiners District of the State of Florida, had a conversation with Erwin

White prior to the body of James E. White being transferred to leesburg, Lake County, Florida.

4. During that conversation, Erwin White inquired of Defendant Gauger whether or not there was any indication of any foul play or any struggle and, according to Erwin White, was told by Defendant Gauger that there was no such indication and that the death ". . . according to the police report and the rescue squad report was just a simple accidental drowning . . . ." (Deposition of Erwin White page 8, line 9, et seq.) After learning this, Erwin White advised Defendant Gauger that he did not want an autopsy performed on the body. Notwithstanding this objection to an autopsy, Defendant Gauger advised Erwin White that an autopsy was required under state law. (Erwin White deposition page 17, line 7,

et seq. and page 21, lines 1-22.) Defendant Gauger testified at his deposition that his recollection of this conversation was different from that of Erwin White.

5. That Assistant State Attorney James W. Phillips, sometime between April and October, 1983, made a request that autopsies be performed on all drowning victims in Marion County, Florida, and testified that his authority for this request was Section 925.09, Florida Statutes.

6. That Assistant State Attorney Phillips had no knowledge of the facts and circumstances surrounding the death of James E. White prior to the autopsy being performed on his body.

7. Notwithstanding the objection of Erwin White to an autopsy being performed

on the body of James E. White, a full autopsy was performed by Defendant Techman.

8. That Defendant Techman did not know the cornea had been removed from the body of James E. White until it had been delivered to him in Leesburg, Florida, and the cornea were removed prior to the body being transported to Leesburg.

9. On July 11, 1983, at approximately 2:00 a.m., Anthony Wayne Powell, a 20 year old single male, and the son of Plaintiffs WADE and FREDA POWELL, was severely injured as a passenger in a motor vehicle collision. He was admitted to Defendant, MUNROE REGIONAL MEDICAL CENTER, at approximately 4:49 a.m. and pronounced dead at that time.

10. Plaintiff, WADE POWELL, after being notified of his son's accident, identified the body of Anthony W. Powell at the hospital at approximately 5:15

a.m. on July 11, 1983, and thereafter he and his wife, FREDA POWELL, went into an adjacent waiting room where they remained until 7:30 a.m.

11. At approximately 6:30 a.m., the corneas of Anthony Wayne Powell were removed by a technician under the direction of Defendant District Medical Examiner, WILLIAM H. SHUTZE, at Defendant, MUNROE REGIONAL MEDICAL CENTER, while the Plaintiff parents, WADE and FREDA POWELL, waited in an adjacent waiting room.

12. No one asked the Plaintiff parents, WADE and FREDA POWELL, whether they had any objection to the removal of their son's cornea, or whether they consented to same.

13. Had they been asked, the Plaintiff parents, WADE and FREDA POWELL, would have objected to and would not have

consented to removal of their son's cornea.

14. At approximately 7:30 a.m., Plaintiffs, WADE and FREDA POWELL, left the hospital, unaware their son's cornea had been removed.

15. That it is the policy of the Office of the Medical Examiner not to solicit objections to corneal removal or to advise next of kin of the intent to remove cornea.

16. That no one associated with the Office of the Medical Examiner knew of a patient in need of a cornea except that the Intervenor eye banks had disseminated information that there is always a need for cornea for transplant.

17. That one of the cornea removed from the body of James E. White was not used for transplantation but for some other purpose and the other was trans-

ported to the State of New York and transplanted into a patient in that state.

COMMENTS AND CONCLUSIONS OF LAW

The following comments are strictly those of the Court gleaned from researching the relevant law as to this case and its historical bases.

Since the beginning of time man has regarded the control, possession and custody of the body and remains of a deceased family member as a basic and cherished right. There are deep religious, moral and philosophical beliefs and convictions upon which this view is predicated. Although the Court is mindful of these views, these cases must be decided on legal grounds which in many respects parallel those views.

The Cornea Removal Statute has as its purpose the commendable and laudable

objective of providing high quality cornea tissue to those in need of same. It helps supply and restore sight to the very young, the sick, accidental and diseased victims, and the very old. The gift of sight is one of the most precious of life.

The efforts of the Legislature, civic organizations, such as the Lions Club, and other groups and efforts to assist in these purposes of providing sight for the sightless should be encouraged and supported. This Court supports those efforts.

However, notwithstanding public good which may result from the Cornea Removal Statute and the other statutes, providing for the transfer of human organs, they are only valid if they meet constitutional requirements. If the taking of the cornea is by way of the consentual

execution during the donor's lifetime of an anatomical gift or a gift after death with the consent of the next of kin, it is certainly constitutionally permissible. When the taking is without the requirements of inter vivos consent or post mortem consent of the next of kin, it is constitutionally invalid for the reasons set forth below (emphasis supplied).

It is the lack of consent, either while living or after death, the consent of the next of kin (or at least the requirements of reasonable notice to the next of kin to obtain same) that makes the Cornea Removal Statute unconstitutional.

The statute requires no notice to the next of kin whatsoever.

The Court finds in light of the facts of this case and the relevant law:

1. That Section 406.11, Florida Statutes -- "The Medical Examiner's Act", is constitutional on its face and was constitutionally applied in these cases.

2. That Florida Statutes 732.9185 -- "Cornea Removal Law", is facially unconstitutional for the following reasons:

a. Plaintiffs have a right to receive, possess and dispose of the body of their sons in the same condition as his death left it, except for the results of a lawful autopsy.

b. This right is an intimately personal and fundamental one implicit in the concept of ordered liberty and may not be transgressed or interfered with by State action without a compelling state interest.

c. This right has been characterized by the courts of the State of

Florida as a property right enjoyed by the next of kin. Dunahoo v. Bess, 200 So.541 (Fla.1941); Kirksey v. Jernigan, 45 So.2d 188 (Fla.1950). The deaths of James E. White on June 15, 1983, and of Anthony W. Powell on July 11, 1983, fell squarely within conditions contained in the statute, under which autopsies are authorized.

d. Section 732.9185 deprives Plaintiffs of this right without affording them procedural or substantive due process of law guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, Section 9 of the Constitution of the State of Florida because it allows an alteration of and removal of a part from the body of their son without notice or an opportunity to be heard and creates and placed Plaintiffs in an invidious classifica-

tion. This classification is a statutory scheme which causes the next of kin of persons who die under circumstances which cause the decedent to come under the jurisdiction of the Medical Examiner and which subject the remains to an autopsy to suffer the consequences of having a part of those remains removed without notice and without their consent and therefore deprives them of their right to receive, possess and dispose of those remains in the same condition as death left them, while the next of kin of persons who die under circumstances which do not cause the decedent to come under the jurisdiction of the Medical Examiner and which do not subject those remains to an autopsy do not suffer the consequences of having a part of those remains removed without notice and without their consent and they are not deprived of their right

to receive, possess and dispose of those remains in the same condition as death left them.

e. This invidious classification and the resultant action also deprive Plaintiffs of their right to equal protection of the law guaranteed them by the 14th Amendment to the United States Constitution and Article I, Section 2 of the Constitution of the State of Florida.

f. Removal of the cornea from the remains of their son and without notice to them and without their consent and against their wishes and desires is an unconstitutional invasion of Plaintiffs' rights of privacy under the 4th and 14th Amendments of the United States Constitution and Article I, Section 23 of the Constitution of the State of Florida. The right of Plaintiffs to receive, possess and dispose of the remains of

their son in the same condition as death left them is an intimate personal right which is fundamental and implicit in the concept of ordered liberty. Moore v. City of Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed2d 531 (1977); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed2d 147 (1973); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed2d 510 (1965); Sotto v. Wainwright, 601 F.2d 184 (5th Cir. 1979).

g. Removal of cornea from decedents under the jurisdiction of the medical examiner for transplantation into other persons constitutes a taking of private property by state action for a non-public purpose in violation of Article X, Section 6(a) of the Constitution of the State of Florida.

h. The statute grants to the medical examiner arbitrary authority to dispose of cornea by unauthorized removal, in direct contravention to the wishes of the surviving next of kin Plaintiffs and in violation of procedural due process protections and requirements of Article I, Section 9, of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

3. There is no compelling state interest in the removal of cornea from deceased persons, without consent from the next of kin, which outweighs the rights of the surviving next of kin to possession and disposition of the deceased's body in the same condition as when death occurred.

Accordingly, it is ORDERED AND ADJUDGED as follows:

1. That the Motion for Summary Judgment of the Defendants and Intervenors on the facial constitutionality of Florida Statutes 406.11 is hereby granted and said statute is held to be constitutional on its face.

2. That the Motions for Summary Judgment of the Plaintiffs that Section 732.9185, Florida Statutes, is unconstitutional on its face.

3. That the Motions for Summary Judgment of the Defendants and Intervenors on all other issues are denied.

DONE AND ORDERED in chambers at Ocala, Marion County, Florida, this 22 day of August, 1985.

WILLIAM T. SWIGERT, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished this 23 day of

August, 1985, to all counsel listed on the attached.

Mary W. Sullivan, Judicial Assistant

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

406.11 Examinations, investigations, and autopsies.--

(1) In any of the following circumstances involving the death of a human being, the medical examiner of the district in which the death occurred or the body was found shall determine the cause of death and shall make or have performed such examinations, investigations, and autopsies as he shall deem necessary or as shall be requested by the state attorney:

(a) When any person dies in the state:

1. Of criminal violence.
2. By accident.
3. By suicide.
4. Suddenly, when in apparent good health.
5. Unattended by a practicing physician or other recognized practitioner.
6. In any prison or penal institution.
7. In police custody.
8. In any suspicious or unusual circumstance.

9. By criminal abortion.
10. By poison.
11. By disease constituting a threat to public health.
12. By disease, injury, or toxic agent resulting from employment.

(b) When a dead body is brought into the state without proper medical certification.

(c) When a body is to be cremated, dissected, or buried at sea.

(2) The district medical examiner shall have the authority in any case coming under any of the above categories to perform, or have performed, whatever autopsies or laboratory examinations he deems necessary in the public interest.

732.9185 Corneal removal by medical examiners.

(1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under s.732.918, provide a suitable

cornea of a decedent whenever all of the following conditions are met:

(a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance with s.406.11.

(b) No objection by the next of kin of the decedent is known by the medical examiner.

(c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.

(2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under s.732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

CORNEA REMOVAL STATUTES

CALIFORNIA

§ 27491.47. Removal of corneal eye tissue; conditions; civil and criminal immunity

(a) Notwithstanding any other provision of law, the coroner may, in the course of an autopsy, release or authorize the removal and release of corneal eye tissue from a body within the coroner's custody, if all of the following conditions are met:

(1) The autopsy has otherwise been authorized

(2) The coroner has no knowledge of objection to the removal and release of corneal tissue having been made by the decedent or any other person specified in Section 7151.5 of the Health and Safety Code.

(3) The removal of such tissue will not unnecessarily mutilate the body, be accomplished enucleation, nor interfere with the autopsy.

(4) The tissue will be removed by a coroner, licensed physician and surgeon, or a trained transplant technician.

(5) The tissue will be released to a public or nonprofit facility for

transplant, therapeutic, scientific purposes.

(b) Neither the coroner nor medical examiner authorizing the removal of the corneal tissue, nor any hospital, medical center, tissue bank, storage facility, or person acting upon the request, order or direction of the coroner or medical examiner in the removal of corneal tissue pursuant to this section, shall incur civil liability for such removal in an action brought by any person who did not object prior to the removal of the corneal tissue, nor be subject to criminal prosecution for the removal of such corneal tissue pursuant to the provisions of this section.

CONNECTICUT

§ 19a-281. Removal of corneal or pituitary tissue during autopsy.

Authorization

(a) Where an autopsy, authorized pursuant to section 19a-406, is to be performed at the office of the chief medical examiner and the official responsible for conducting the autopsy has reason to believe, (1) that the pituitary or corneal tissue would be beneficial to the health of a living person and (2) that such tissue could be removed without any resulting disfigurement to the body or interference with the subsequent course of the investigation or autopsy, such official shall, if no objection by the decedent's next of kin is known at the time of autopsy and the decedent was not a known member of a religious group with a public position in opposition to tissue removal, remove such deceased person's corneal or pituitary tissue and deposit it in the appropriate bank or storage facility.

(b) Any medical examiner or other authorized official, who acts in good faith and in accordance with the provisions of subsection (a) with respect to the corneal or pituitary tissue of a decedent, shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for this act.

DELAWARE

§ 4711. Authority to provide corneas to eye banks.

(a) Upon request of an approved eye bank on behalf of a patient in need of corneal tissue for a transplant, a Medical Examiner is authorized to provide the cornea under the following conditions:

(1). A decedent who may provide a suitable cornea for transplant is under the jurisdiction of the Medical Examiner;
(2). An autopsy will be required;
(3). No objection by the decedent or next of kin is known by the Medical for his act.

(4) Removal of the cornea for transplant will not interfere with the subsequent course of post-mortem.examination or alter the post-mortem facial appearance.

(b) For the purposes of this section, the following terms shall have the following meanings:

(1) "Approved eye bank", includes the Medical Eye Bank of Delaware and the Eye Foundation of Delaware Valley;

(2) "Next of kin" means:

a. A spouse;

b. If no spouse, the decedent's adult children;

c. If no spouse or adult children, the decedent's parents;

d. If no spouse, adult children of or parents, the person who is legally entitled to claim the decedent's remains for final disposition.

(c) The Medical Examiner or an approved eye bank, while acting in compliance with this section, shall not be liable to the next of kin of a decedent, whose corneal tissue is removed and donated pursuant to this section, for any civil damages (62 Del. Laws, c. 396, § 1;65 Del. Laws, c. 43, § 1.)

GEORGIA

31 23 6. Removal of eye or corneal tissue.

(a) (1) Upon the request of any approved eye bank in any case in which a patient is in need of an eye for a transplant, a physician performing an autopsy by consent, a medical examiner, hospital, or funeral director may provide the eye of a decedent whenever all of the following conditions are met:

> (A) (i) A decedent who may provide a suitable eye for the transplant is under the jurisdiction of a coroner or medical examiner and an autopsy is required in accordance with Article 2 of Chapter 16 of Title 45; or
> (ii) The physician has been requested, as provided by law, to perform an autopsy on a decedent who may provide a suitable eye for the transplant;
>
> (B) The express written consent to the removal of the eye is given the next of kin of the decedent; and
>
> (C) The removal of the eye will not interfere with the subsequent course of an investigation or autopsy.

(2) No physician, coroner, medical examiner, hospital, or funeral director authorizing removal of eye tissue nor any tissue nor any eye bank or its personnel requesting or participating in such removal shall be liable or responsible en any civil or criminal action for the removal or subsequent transplant of the tissue, provided that its removal was in accordance with the requirements of this subsection.

(b) (1) Upon a request from an authorized official of an approved eye bank for corneal tissue to be used for transplants or research, a coroner, a medical examiner, hospital, funeral director, or an authorized official acting for the coroner may permit the removal of the corneal tissue of a decedent by individuals designated by the eye bank for

delivery to the eye bank for such purposes if all of the following conditions are met:

(A) The decedent from whom the tissue is to taken is under the jurisdiction of a coroner or medical examiner pursuant to Code Section 45-16-27;

(B) No objection by the decedent during his lifetime or, after his death, by the appropriate person listed in paragraph (2) of his subsection is known to the coroner, medical examiner, or authorized official acting for the coroner at the time the tissue is removed; and

(C) The person designated by the eye bank to remove the tissue is a person authorized to do so under Code Section 31, 23 5.

(2) Objection to the removal of corneal tissue may be made known to the coroner, medical examiner, hospital, funeral director, or authorized official acting for the coroner by the decedent during his lifetime or by the following persons after the decedent's death:

(A) The decedent's spouse;

(B) If no spouse survives him, any of the decedent's adult children;

(C) If no adult children or spouse survive him, either of the decedent's parents;
(D) If no parents, adult children, or spouse survive him, any of the decedent's brothers or sisters; or
(E) If none of the foregoing survive him, the decedent's next of kin.

(3) No coroner, medical examiner, hospital, funeral director, or authorized official acting for the coroner authorizing the removal of corneal tissue nor any eye bank, its personnel, or other person requesting or participating in the removal of corneal tissue for the eye bank shall be liable in any civil or criminal action for removing corneal tissue from a decedent and using same for transplant or research purposes without obtaining prior consent from any individual listed in paragraph (2) of subsection (b) of this Code section if such individual failed to object prior to such removal as authorized in this Code section and the re-

moval was in accordance with this Code section.

KENTUCKY

311.187. Removal of cornea or corneal tissue from decedent whose death defined as a coroner's case - Conditions. -

(1) In any case in which a patient is in need of a cornea or corneal tissue for a transplant, the coroner, medical examiner, or his appropriately qualified designee with training in ophthalmologic techniques may, upon the request of any person authorized under KRS 311.185, provide or authorize the removal of the cornea or corneal tissue by a qualified physician under the following conditions:

(a) The decedent has been defined as a "coroner's case" as set forth by KRS 72:405(2), an autopsy has been ordered pursuant to KRS 72.410, and the cornea or corneal tissue are suitable for transplant;
(b) No objection by the next of kin is known by the coroner or medical examiner; and

(c) The removal of the cornea or corneal tissue will not interfere with subsequent course of an investigation or autopsy or alter the postmortem facial appearance.

(2) The medical examiner, coroner, or his appropriately qualified designee or any persons authorized under KRS 311.185 shall not be held liable in any civil or criminal action for failure to obtain consent of the next of kin (Enact. Acts 1980, ch. 41, § 1, effective July 15, 1980.)

MARYLAND

§ 4-509.1. When Chief Medical Examiner or his deputy of assistant may provide cornea for transplant.

(a) *Requirements*.- In any case where a patient is in need of corneal tissue for a transplant, the Chief Medical Examiner, the deputy chief medical examiner, or an assistant medical examiner may provide the cornea upon the

request of the Medical Eye Bank of Maryland, Incorporated under the following conditions:

> (1) The medical examiner has charge of a decedent who may provide a suitable cornea for the transplant;
> (2) An autopsy will be required;
> (3) No objection by the next of kin is known by the medical examiner; and
> (4) Removal of the cornea for transplant will not interfere with the subsequent course of an investigation or autopsy or alter the postmortem facial appearance.

(b) *Liability of medical examiner.*-The Chief Medical Examiner, the deputy chief medical examiner, an assistant medical examiner, and the Medical Eye Bank of Maryland, Incorporated are not liable for civil action if the next of kin subsequently contends that authorization of that kin was required.

MICHIGAN

333.10202. Cornea removal

Sec. 10202 (1) In any case in which an autopsy is to be done by a county

medical examiner or a county medical examiner causes an autopsy to be done, the cornea of the deceased person my be removed by * * * a person authorized by the county medical examiner.

2. Removal under subsection (1) may be made only under the following circumstances:

a. An autopsy has already been authorized by the county medical examiner.
b. The county medical examiner does not have knowledge of an objection by the next of kin of the decedent to the removal of the cornea.
c. The removal of the cornea will not interfere with the course of any subsequent investigation or autopsy or alter post-mortem facial appearance.

OHIO

§ 2108.60 [Coroner who performs autopsy may remove or authorize removal of eyes.]

A. As used in this section:

1. "Cornea" or "corneas" includes corneal tissue.
2. "Eye bank" means a nonprofit corporation that is organized under the laws of this state, the purposes

of which include obtaining, storing, and distributing corneas to be used for corneal transplants or other medical or medical research purposes, and that is exempt from federal taxation under subsection 501(c) of the Internal Revenue Code.

3. "Eye bank official" means a person authorized by the trustees of an eye bank to make requests for corneas to be used for corneal transplants or other medical research purposes.

4. "Eye technician" means a person authorized by the medical director of an eye bank to remove the corneas of a decedent.

5. "Internal Revenue Code" means the "Internal Revenue Code of 1954," 68A Stat. 3,26 U.S.C. 1, as amended.

B. A county coroner who performs an autopsy, pursuant to section 313.13 of the Revised Code, may remove one or both corneas of the decedent, or a coroner may authorize a deputy coroner, physician or surgeon licensed pursuant to section 4731.14 of the Revised Code, embalmer authorized under section 2108.071 [2108.071.1] of the Revised Code to enucleate eyes, or eye technician to remove one or both corneas of a decedent whose

body is the subject of an autopsy performed pursuant to section 313.13 of the Revised Code, if all of the following apply:

1. The corneas are not necessary for the successful completion of the autopsy or for evidence;
2. An eye bank official has requested the removal of corneas and certified to the coroner in writing that the corneas will be used only for corneal transplants or other medical or medical research purposes;
3. The removal of the corneas and gift to the eye bank do not alter a gift made by the decedent or any other person authorized under this chapter to an agency or organization other than the eye bank;
4. The coroner at the time he removes or authorizes the removal of the corneas, has no knowledge of an objection to the removal by any of the following:
    a. The decedent, as evidenced in a written document executed during his lifetime;
    b. The decedent's spouse;
    c. If there is no spouse, the decedent's adult children;
    d. If there is no spouse and no adult children, the decedent's parents;
    e. If there is no spouse, no adult children, no parents, the decedent's brothers or sisters;

f. If there is no spouse, no adult children, no parents, and no brothers or sisters, the guardian of the person of the decedent at the time of death;

g. If there is no spouse, no adult children, no parents, no brothers or sisters, no guardian of the person of the decedent at the time of death, any other person authorized or under obligation to dispose of the body.

C. Any person who acts in good faith under this section and without knowledge of an objection, as described in division (B)(4) of this section, to the removal of corneas is not liable in any civil or criminal action based on the removal.

TEXAS

ART. 4590-4. Justice of the peace or medical examiner; permitting removal of corneal tissue

Permission to take tissue

Section 1. On a request from an authorized official of a nonprofit corporation chartered under the laws of Texas, to obtain, store and distribute donor eyes to

be used by those licensed to practice medicine for corneal transplants, for research, or for other medical purposes and whose medical activities are directed by one licensed to practice medicine in Texas, for corneal tissue, the justice of the peace or the medical examiner may permit the taking of corneal tissue if:

1. the decedent from whom the tissue is to be taken died under circumstances requiring an inquest by the justice of the peace or the medical examiner;
2. no objection by a person listed in Section 2 of this Act is known by the justice of the peace or the medical examiner; and
3. the removal of corneal tissue will not interfere with the subsequent course of an investigation or autopsy, or alter the postmortem facial appearance.

Objection to taking

Section 2. Objection may be made known to the justice of the peace or the medical examiner by the following persons:

1. the decedent's spouse;
2. if no spouse, the decedent's adult children;

3. if no adult children or spouse, the decedent's parents; or
4. if no parents, adult children, or spouse, the decedent's brothers or sisters.

Liability for damages

Section 3. The justice of the peace, the medical examiner, and the eye bank official are not liable for damages in a civil action brought by a person listed in Section 2 of this Act who has not objected prior to the removal of the corneal tissue on any theory of civil recovery based on a contention that the consent of plaintiff was required prior to the removal of corneal tissue as authorized by this Act. Chapter 309, Acts of the 64th Legislature, Regular Session, 1975 (Article 6252-26, Vernon's Texas Civil Statutes), applies to a justice of the peace, medical examiner, and their personnel who remove, permit removal, or deny removal of corneal tissue under this

Act as if the justice of the peace, medical examiner, and their personnel were state officers or employees.

WEST VIRGINIA

§16-19-3a. Recovery of corneas; conditions; liability of medical examiner.

A. In any case where a patient is in need of corneal tissue for a transplant, the chief medical examiner, assistant medical examiner, regional pathologist or any other person designated to perform an autopsy in accordance with article twelve [§ 61-12-1 et seq.], chapter sixty-one of this Code, may provide a cornea for transplant, under rules, regulations and procedures established by the chief medical examiner, upon the request of the medical eye bank of West Virginia, incorporated, under the following conditions:

1. The body of the decedent having a suitable cornea for the transplant is under the jurisdiction of the chief medical examiner and an autopsy is required, in accordance with article twelve [§ 61-12-1 et seq.], chapter sixty-one of this Code;

2. The decedent's next of kin makes no objections; and

3. Transplanting of the cornea will not interfere with the course of any subsequent investigation or autopsy or alter the postmortem facial appearance.

B. Neither the chief medical examiner, any assistant medical examiner, regional pathologist nor any other person designated to perform an autopsy in accordance with section ten [§ 61-12-10], article twelve, chapter sixty-one of this Code and who provides a cornea in accordance with the provisions of this section, nor the medical eye bank of West Virginia, incorporated, shall be liable for any civil damages if the decedent's next of kin subsequently contends that his authorization was required.

Respectfully submitted,

STEPHEN T. MAHER
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Attorney for Petitioners

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
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CLERK

No. 86-1536

In The
Supreme Court of the United States
October Term, 1986

Wade Powell and Freda Powell, His Wife,
And Erwin White and Susan White, His Wife,
Petitioners,

v.

State of Florida, Munroe Regional Medical Center, William H. Shutze, M.D., Keith Gauger, Thomas M. Techman, North Florida Lions Eye Bank, Inc., The Medical Eye Bank, Inc., Florida Lions Eye Bank, Inc., Florida Society of Ophthalmology, Inc., Metropolitan Dade County, And The Florida Medical Association,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

DOES THE CONSTITUTIONALITY OF FLORIDA'S RESTORATION OF SIGHT ACT, WHICH EFFECTIVELY AIDS THE PUBLIC HEALTH BY PROVIDING SIGHT TO BLIND CITIZENS, MERIT REVIEW WHEN SIMILAR LAWS HAVE BEEN CONSISTENTLY UPHELD IN OTHER STATES AND WHEN NO IMPORTANT FEDERAL LAW IS IMPLICATED, BECAUSE NO RELIGIOUS OBJECTION HAS EVER BEEN ASSERTED AND NEITHER PROPERTY NOR PRIVACY RIGHTS PROTECTED BY DUE PROCESS ARE RAISED BY A SURVIVOR'S RIGHT TO DISPOSE OF A CORPSE?

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STATEMENT OF CASE

The Florida Supreme Court found that blindness imposes a staggering burden on the public health and welfare of Florida's citizens, crippling otherwise productive lives. *State of Florida v. Powell,* 497 So.2d 1188, 1190-91 (Fla. 1986). Corneal transplantation has dramatically eased this burden since its development in the 1930's. Today, the number of Florida's citizens benefiting from corneal transplantation exceeds 3,000 annually, reducing significantly the $138 million spent each year by Floridians to aid their blind. *Id.*

The court also found that the demand for corneal tissue was increasing due to the growing number of Florida's elderly, because corneal blindness is often age-related. *Id.* Furthermore, newborns can now receive corneal transplants to prevent permanent blindness caused by loss of the ability to "learn to see". *Id.* Without a law authorizing medical examiners to remove corneal tissue from corpses undergoing autopsies, there would be virtually no corneal tissue available for infants, and these children would remain forever blind. *Id.*

The key to successful corneal transplantation is the availability of suitable corneal tissue, a thin, transparent membrane covering the eye which is approximately .5 millimeters in thickness and 12 millimeters in diameter. (R 579). This tissue must be removed within a few hours after death in order for it to be useful for transplants. Also vital to successful transplant is the quality of tissue available. The court found that prior to enactment of Section 732.9185, Florida Statutes (1983), available corneal tissue, which was typically donated by the elderly, was largely unusable. *Id.*

In order to relieve the public health problem of the suffering and burdens of the blind, the Florida Legislature enacted Section 732.9185, Florida Statutes, commonly known as the Restoration of Sight Act. Implemented in 1977, this law provides that corneas may be removed only if a decedent is under the jurisdiction of the medical examiner, only if an autopsy is required by law, only if the removal will not interfere with the investigation or the autopsy, only if a request from an eye bank to meet a present need for tissue is made, and only if no objection to the removal is known to the medical examiner. An autopsy is a surgical dissection resulting in a massive intrusion into the body. Removal of the corneal tissue, by comparison, is an infinitesimally small intrusion which does not affect the decedent's appearance since, regardless of corneal removal, the eyes must be capped after death to maintain normal appearance. *Id.* Section 732.9185 contains safeguards clearly designed to limit corneal removal to those instances where the public's interest is greatest and the impact on next of kin the least. Hence, it utilizes the least intrusive means available to achieve a vital public goal.

The record shows that the statute, also known as the Medical Examiner's Law, indisputably increased the quantity and quality of corneal tissue, with the number of transplants increasing from 500 to 3,000 annually in Florida since its enactment. *Id.* This increased availability is primarily attributable to Section 732.9185, which does not place a duty upon medical examiners to seek out the next of kin and obtain consent for corneal removal. The importance of this factor is well-illustrated by the experience in California, where an overwhelming majority of surviv-

ing family members consented to the removal procedure, but eighty percent of such families could not be located in time to remove the corneal tissue while it was still suitable for transplantation. *Id.*

Many of Petitioners' assertions are not based on the record, and reflect more a disagreement with the Medical Examiner's Law rather than a demonstration of constitutional infirmity, as is especially apparent from Petitioners' failure to cite supporting cases. Petitioners allege that the medical examiners in this case failed to comply with the Florida Statute and should have known of objections. Such allegations, which miscolor the facts, have no bearing on the constitutionality of this law. Likewise, Petitioners' reference to a poll regarding organ transplants is *dehors* the record, as well as not being comparable with corneal transplants. Petitioners speculate that the medical examiners conspired to prevent objections, again without record support. Despite Petitioners' contrary representation, medical examiners cannot remove corneas if an objection is known or if the statutory conditions are not met, and hence have no "unchecked veto power".

In 1983, autopsies were performed on two separate decedents who died in Florida as the result of accidents. The autopsies were performed by separate medical examiners who in each instance, under the authority of Section 732.9185, removed the corneal tissue from the decedent without giving notice to or obtaining consent from survivors. *Id.* at 1189.

Petitioners, decedents' parents, sued for damages for wrongful removal of the corneas, seeking a declaratory judgment that the Medical Examiner's Law is unconstitu-

tional. Respondents, the Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc., and Florida Lions Eye Bank, Inc., were granted intervention as parties in support of the statute. These Respondents are non-profit organizations which assist in recovery and distribution of corneal tissue in an effort to relieve blindness. These organizations depend on donations to carry out their voluntary public service since processing fees pay for only two-thirds of the costs of providing corneal tissue to blind persons, and if no insurance is available the corneas are provided without charge. Medical examiners also receive no compensation for retrieval of corneas. (R 573-74). The Florida Supreme Court, in reversing the trial court, found the statute was constitutional since it was a reasonable means of protecting the public health and welfare. *Id.* at 1193-94.

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SUMMARY OF ARGUMENT

Review of the constitutionality of Florida's Restoration of Sight Act is unwarranted because the law does not implicate due process rights, and because other courts reviewing similar laws have consistently upheld this type of law. Courts in both Georgia and Michigan have found those states' Medical Examiner's Laws to be constitutional, finding that no property interest was implicated by the right to dispose of a corpse. Likewise, no privacy right was raised by the right of disposition since death necessarily ended all privacy interests.

Petitioners may not assert a religious claim based on the free exercise clause of the first amendment as they

have never asserted a religious objection in this record. Petitioners may not assert the hypothetical religious beliefs of third-parties, and have made no showing whatsoever that Petitioners' sincerely held religious beliefs are affected by the challenged statute.

No important federal question is raised because no due process rights are involved with a right to dispose of a corpse. No property rights are concerned because state common law determines the extent of property rights. Florida's courts have clearly found that only a cause of action in tort arises from the right of sepulture, and that this claim is not equivalent to a property right.

No privacy rights exist in disposal of a corpse undergoing autopsy since it is unreasonable to expect privacy in such circumstances. This is especially true since corneal removal during autopsy relieves a serious public health burden by preserving usuable corneal tissue to restore sight to the unsighted. When serious public health concerns are at hand, such as relief of blindness, privacy interests are necessarily limited.

Further, no bodily privacy can exist in a corpse since the supporting principle of personhood has been terminated by death. Likewise, no privacy in relationships can exist since the only relationship at issue between survivor and decedent is also terminated by death. Privacy interests simply cannot exist in these circumstances.

———o———

ARGUMENT

I

A GRANT OF CERTIORARI IS NOT WARRANTED IN THIS CASE SINCE THE FLORIDA STATUTE IS NOT REPUGNANT TO THE CONSTITUTION, AND THERE IS NO CONFLICT AMONG DECISIONS.

Petitioners invoke the discretionary jurisdiction of this Court pursuant to 28 U.S.C. Section 1257(3) (1977), which provides that review of a state supreme court decision may be had by writ of certiorari where "the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . ." Contrary to this assertion, however, the statute in question simply does not implicate, much less impinge upon, constitutional rights.

Moreover, the rules of this Court provide that a writ of certiorari "will be granted only when there are special and important reasons" such as

> [w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

Sup.Ct.R. 17. Far from conflicting with decisions in other states, the Florida Supreme Court's holding in the present case is consistent with and relies upon other decisions which have upheld this type of statute.

Two other state courts have ruled on the constitutionality of statutes authorizing corneal removal in conjunction with an autopsy when no objection is known. Both state courts, as did the Florida Supreme Court, upheld the constitutionality of these Medical Examiner's Laws against due process challenges.

Most recently, the Georgia Supreme Court upheld against due process attacks a very similar statute authorizing corneal removal during autopsy when no objection is known. *See Georgia Lions Eye Bank, Inc. v. Lavant,* 255 Ga. 60, 335 S.E.2d 127 (1985) (App. 1). This Court denied certiorari review of the Georgia Supreme Court case. *Id., cert. denied,* 106 S.Ct. 1464 (1986). The Georgia high court found that there was no constitutionally protected property right in a decedent's body. The only right was a common law claim for disposition of the corpse, a right which could be modified to preserve the public health and welfare.

Likewise, the Michigan Court of Appeals upheld a statute almost identical to the Florida law in *Tillman v. Detroit Receiving Hospital,* 138 Mich. App. 683, 360 N.W. 2d 275 (1984), *appeal denied,* No. 75442 (Mich. June 3, 1985) (App. 7). The Michigan court rejected an assertion that a survivor's right of privacy was violated by the statute, finding that the right to bury a dead body was not fundamental or implicit in the concept of ordered liberty. Moreover, privacy rights were found to be personal, ending with death. Since neither the survivor nor the decedent possessed a fundamental right with regard to a decedent's corpse, the Michigan Medical Examiner's Law did not infringe upon privacy rights.

The Florida Supreme Court's decision in *State of Florida v. Powell* is thus consistent with and relies on these other decisions concerning this same type of statute. 497 So.2d 1194 n.4. Therefore, conflict of decisions, the primary consideration for certiorari review, is absent. *See* Sup.Ct.R. 17.

II

PETITIONERS DID NOT ASSERT A RELIGIOUS OBJECTION TO THE STATUTE, AND THE RIGHT TO FREE EXERCISE OF RELIGION IS THEREFORE NOT AN ISSUE IN THIS CASE.

The Petitioners did not raise any allegation concerning religious beliefs in their Complaint or in support of their motion for summary judgment. They did not raise any legal argument to the trial judge based on the free exercise clause of the first amendment, and the trial court made no mention of it. Notably, Petitioners cite only the due process clauses of the fifth and fourteenth amendments as being involved in this case (Petition at 4), conceding that no first amendment claim is raised. In sum, there is not a single word in the record to establish what religious beliefs of Petitioners are affected by the Restoration of Sight Act. Petitioners have neither a record basis nor standing to raise a free exercise claim.

Petitioners similarly attempted to interject arguments concerning religious beliefs before the Florida Supreme Court. That court was quick to reject such improper and hypothetical arguments:

> The record contains no evidence that the appellees' objections to the removal of corneal tissues for human transplants are based on any "fundamental tenets of their religious beliefs." *Wisconsin v. Yoder,* 406 U.S. at 218, 92 S.Ct. at 1534. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct

> in which society as a whole has important interests." *Id.* at 215-16, 92 S.Ct. at 1533.

State of Florida v. Powell, 497 So.2d at 1193.

In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), this Court held that constitutional claims concerning the free exercise clause cannot rest on hypothetical religious beliefs. A person asserting a religious objection must show that the conduct which the state is affecting is based on a "legitimate religious belief," *id.* at 214, which must be sincerely held by the claimant as a prerequisite to a free exercise claim. *See Harris v. McRae,* 448 U.S. 297 (1980) (no standing to assert free exercise claim where no allegations or proof that statute restricted party's religious belief); *Sourbeer v. Robinson,* 791 F.2d 1094 (3d Cir. 1986) (claimant must sincerely hold religious belief to raise an objection). Moreover, if a belief is "philosophical and personal rather than religious" or is "merely a matter of personal preference" and not one of deep religious conviction, first amendment protections do not apply. *Yoder,* 406 U.S. at 216.

On this record and in this case, Petitioners cannot now assert a religious objection, because they have totally failed to establish any basis for such a claim. In short, this case simply does not involve any issue of religion.

III

NO IMPORTANT ISSUE OF FEDERAL LAW IS RAISED BECAUSE THE RIGHT TO DISPOSE OF A CORPSE DOES NOT IMPLICATE DUE PROCESS RIGHTS.

A.

NO PROPERTY RIGHTS

"Property interests, of course, are not created by the Constitution. Rather, they are created . . . by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). The only independent source defining rights of disposition of a corpse emanate from Florida's common law, as interpreted by its state courts. There are no constitutional or statutory sources relating to this common law concept.

The Florida Supreme Court has clearly held that, in Florida, no property right exists related to a survivor's right of burial. *See State of Florida v. Powell,* 497 So.2d at 1191-92; *Kirksey v. Jernigan,* 45 So.2d 188, 189 (Fla. 1950) (right is limited to possession of body for burial). The next of kin has only a personal right of action in tort for interference with the right of burial, *id.,* and tort actions may be modified or limited when necessary to obtain a permissible state objective. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59 (1978). Relieving the suffering of the blind certainly meets this criterion. But due process protections are not offended since no property rights recognized by state law are involved. A person cannot claim procedural rights

if he does not have a property interest in the matter affected. *Board of Regents v. Roth.*

B.

NO PRIVACY RIGHTS

1. Public Health Concerns Make Privacy Rights Unreasonable In These Circumstances

A constitutionally protected right of privacy only arises when personal rights are "fundamental" or "implicit in the concept of ordered liberty". *Roe v. Wade,* 410 U.S. 113, 152 (1973). Petitioners' asserted "liberty" interest, to be free from governmental intrusion in the disposition of their decedents' corpses, is indistinguishable from this concept of privacy rights under due process, and in this context is synonymous with privacy rights. *See Carey v. Population Services International,* 431 U.S. 678, 684 (1977) ("the Court has recognized one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is a 'right of personal privacy'. . . ."); *Roe v. Wade,* 410 U.S. at 153 (right of privacy founded on concept of liberty in Due Process Clause).

For several reasons, Petitioners' right to dispose of a body without even minor alteration is neither fundamental nor implicit within a concept of ordered liberty. First, within the arena of public health concerns, privacy rights are very difficult to establish. When the state asserts an important interest concerning the public health, such as relief of blindness, courts are reluctant to support asserted privacy interests, recognizing that health issues are of vital legislative concern to the states. *See Whalen v. Roe,* 429 U.S. 589 (1977) (state is accorded wide latitude in constitutional privacy terms to control

health); *Roe v. Wade,* 410 U.S. 113, 154 (1973) (when state asserts effort to safeguard health, privacy rights may be subordinated to state regulation); *State of Florida v. Powell,* 497 So.2d at 1193. The state interest is evident in this area through pervasive regulation of dead bodies, including laws which restrict where, when, and how a corpse may be buried or cremated. *See, e.g.,* § 872.03, Fla. Stat. (illegal to cremate body within 48 hours of death); §§ 382.14, 382.39, Fla. Stat. (illegal to transport or inter body without permit); § 382.081, Fla. Stat. (death certificate required before burial).

Moreover, Florida's autopsy statute itself, Section 406.11, Florida Statutes (1985), authorizes broad state involvement in the disposition and control of a dead body. Although Petitioners originally challenged this statute also, they did not appeal the trial court's finding which upheld this law and thus they have accepted the constitutionality of the autopsy statute. Under the autopsy statute, the medical examiner has the broad discretionary authority to order an autopsy whenever a person dies suddenly when apparently in good health or dies of a disease which may be considered a threat to public health.

If a person were suspected of dying of a contagious disease, the medical examiner could clearly perform an autopsy, which is typically a massive invasion of the body, and remove any organ necessary for diagnosis to protect the public health. He could do this even if he knew of an objection by next of kin. Surely, the medical examiner may remove corneal tissue during an autopsy to promote the public health when the statutory requirements are met and when no objection is known. Both an autopsy and

preservation of corneal tissue unquestionably further the public health.

Under the circumstances of non-consensual autopsy, which typically involves a gross dissection of the corpse, a survivor can have no reasonable expectation of privacy in the decedent's corneal tissues. Moreover, compared to the autopsy statute, Florida's Medical Examiner's Law imposes no serious burden on the right to burial since the body is visually unaltered. If the Medical Examiner's Law implicates a privacy right, then the much more intrusive and equally vital autopsy statute must be subject to the same expansive reading to include due process protections.

Respondents submit that Petitioners' attempt to extend privacy rights into areas to which they have not before been applied is an unacceptable stretching of the Constitution, which this Court has shown an unwillingness to sanction:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Bowers v. Hardwick, 106 S.Ct. 2841, 2846 (1986). Indeed, if the right of parents to sepulture, a right of disposition founded in tort, rises to constitutional privacy dimensions, then by analogy all parental rights for tortious injury to their children must, in general, be afforded equal privacy protections. Surely, such is not the intent of this Court's discernment of privacy interests.

2. Personal Privacy Rights End With Death

Further, this Court made clear in *Roe v. Wade* that the right to bodily privacy emanated from a right to control one's *own* body. Federal courts have consistently held, however, that "[a]fter death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived." *Whitehurst v. Wright,* 592 F.2d 834, 840 (5th Cir. 1979). *Accord Roe v. Wade,* 410 U.S. 113 (1973); *Silkwood v. Kerr-McGee Corp.,* 637 F.2d 743 (10th Cir. 1980), *cert. denied,* 454 U.S. 833 (1983); *Guyton v. Phillips,* 606 F.2d 248 (9th Cir. 1979), *cert. denied,* 445 U.S. 916 (1980). A privacy right of bodily privacy ends with death and may not be claimed by survivors.

Moreover, in *Tillman,* the recent Michigan case dealing with a similar statute, the state court recognized that any privacy right was limited to decisions about one's own body, and did not survive death:

> The privacy right encompasses the right to make decisions concerning the integrity of one's body. This right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin. Accordingly, we reject plaintiff's constitutional challenge predicated on the right of privacy.

360 N.W.2d at 277 (citations omitted). Because privacy rights regarding control of one's body are derived from notions of personhood, once a person dies any privacy rights surrounding control of bodily tissue also terminate. *See McLean v. Rogers,* 100 Mich. App. 734, 300 N.W.2d 389 (1980) (right of privacy ends with death and may not be claimed by next of kin).

3. Privacy Rights In Relationships End With Death

In the past, this Court has also recognized privacy interests in the context of an intimate, ongoing relationship, such as child rearing, *see Pierce v. Society of Sisters,* 268 U.S. 510 (1925), or marriage, *see Boddie v. Connecticut,* 401 U.S. 371 (1971). No privacy rights are, however, implicated in the right to dispose of a corpse, because no ongoing familial relationship exists between survivors and a decedent which gives rise to a privacy interest in the corpse. As the Michigan Court wrote in *Tillman,*

> The threshold question is whether plaintiff has privacy rights which are implicated here. Only rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guaranty of the right of personal privacy. Plaintiff claims that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation. While there is no property right in the next of kin to a dead body, Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation.
>
> We do not find this common law right to be of constitutional dimension.

360 N.W.2d at 277 (citations omitted). Because there is no such existing and ongoing relationship, privacy rights do not attach to protect the feelings of a survivor which, although admittedly important, do not rise to the level of a fundamental and protected relationship.

———o———

CONCLUSION

The record conclusively establishes an overwhelming public health benefit from Florida's Restoration of Sight Act. By preserving corneal tissue to give sight to others, the law transforms the tragedy of death into a process of creation. Perhaps this compassion and relief for the suffering of the blind merits recognition as a quality of civilization. The record establishes that this statute is the least intrusive means of providing vital corneal tissue for restoring sight, and that no viable alternative exists to achieve this essential public health goal. Under these circumstances, and especially when no decisional conflict exists, certiorari review of this law should be denied.

Respectfully submitted, this 20th day of April, 1987.

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APPENDIX

255 Ga. 60

GEORGIA LIONS EYE BANK, INC. et al.

v.

LAVANT.

No. 42351.

Supreme Court of Georgia.

Oct. 9, 1985.

Rehearing Denied Oct. 29, 1985.

Mother of infant, who had died of sudden infant death syndrome, brought suit against hospital and an eye bank for the wrongful removal of corneal tissue of infant following death pursuant to statute. The State Court, Chatham County, David R. Elmore, Senior Judge, held that statute authorizing removal for transplant of corneal tissue of decedents violated due process, and appeal was taken. The Supreme Court, Weltner, J., held that: (1) in Georgia, there is no constitutionally protected right in a decedent's body, and (2) statute authorizing removal for transplant of corneal tissue of decedents if no objection is made by decedent in his life or by his next-of-kin after death is constitutional.

Reversed.

Marshall, P.J., filed dissenting opinion.

1. Constitutional Law 82(6)

In Georgia, there is no constitutionally protected right in a decedent's body; rather, concept of quasi property recognizes interests of surviving relatives in possession or control of decedent's body, and such common-law concept is not of constitutional dimension.

2. Common Law 11

Right of action existing at common law may be modified or abrogated by legislature.

3. Dead Bodies 1

The General Assembly had it within its power, in interest of public welfare, to authorize removal for transplant of corneal tissue of decedents, and thus, O.C.G.A. § 31-23-6(b)(1), which authorizes such procedure if no objection is made by decedent in his life or by his next-of-kin after death is constitutional. U.S.C.A. Const.Amends. 5, 14.

Kent & Barrow, A. Martin Kent, Stanley M. Karsman, Karsman, Brooks, Painter & Callaway, P.C., Savannah, William B. Gunter, Everette L. Doffermyre, Jr., Constance C. Russell, Kilpatrick & Cody, Atlanta, Joseph B. Brennan, Bouhan, Williams & Levy, Savannah, for Georgia Lions Eye Bank, Inc., et al.

Walter W. Ballew III, Kran Riddle, Calhoun, Hubbard, Riddle & Cox, P.C., Savannah, for Patricia P. Lavant.

WELTNER, Justice.

This appeal is from an order of the State Court of Chatham County holding unconstitutional OCGA § 31-23-6(b)(1), which authorizes, under specified circumstance,[1] removal for transplant of the corneal tissue of decedents if no objection is made by the decedent in his life or by his next-of-kin after death.

This law was enacted by a virtually unanimous General Assembly in 1978. The record indicates that before its passage, approximately 25 corneal transplants were performed each year. In 1984, however, more than 1000 persons regained their sight through transplants.

Pursuant to this Code section, officials of the Georgia Lions Eye Bank removed during autopsy the corneal tissue of an infant, who had died of sudden infant death syndrome. While the parents of the infant did not object, there was no notice of the intended removal, nor any realistic opportunity to object. Sometime later, the mother discovered for the first time that the corneal tissue had been removed. She brought suit against St. Joseph's Hospital and the Georgia Lions Eye Bank for the wrongful removal of the tissue.

The court held the statute violative of due process in that it deprives a person of a property right in the corpse of his next-of-kin, and fails to provide notice and an opportunity to object.

---

1. OCGA § 45-16-27(a)(1) provides, in part, that coroners shall require a post-mortem examination or autopsy when any person dies "suddenly when in apparent good health."

1. In the earlier days of the common law, so Blackstone avers, no property right existed relative to a dead body, and matters concerning corpses were left to the ecclesiastical courts. "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried." 2 W. Blackstone, Commentaries *429 (T. Cooley, ed. 1899).

Because there were no ecclesiastical courts in this country to resolve matters relating to corpses, the courts conceived the notion of "quasi-property right," when referring to the interest of relatives in the bodies of their next-of-kin. Dean Prosser noted: "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." W.L. Prosser and W.P. Keeton, *Prosser and Keeton on Torts,* p. 63 (5th ed. 1984).

In Georgia, an early case considering this interest of next-of-kin is *Louisville Railroad Co. v. Wilson,* 123 Ga. 62, 51 S.E. 24 (1905). The precise nature of the interest was never defined, although we held that some type of claim was stated. However, in *Pollard v. Phelps,* 56 Ga. App. 408, 415, 193 S.E. 102, 107 (1937), the court held that "[a]t common law no property right was held to exist in a dead body; and though this view is still maintained in a strict sense, the courts of civilized and Christian countries regard respect for the dead as not only a virtue but a duty, and hold that, in the absence of testamentary dis-

position, a quasi property right belongs to the husband or wife, and, if neither, to the next of kin." See also *Rivers v. Greenwood Cemetery, Inc.*, 194 Ga. 524, 525, 22 S.E. 2d 134 (1942), wherein we held "that a dead body is quasi property over which the relatives of the deceased have rights which the courts will protect."

[1] Thus, it can be seen that in Georgia, there is no *constitutionally* protected right in a decedent's body. Rather, the courts have evolved the concept of quasi property in recognition of the interests of surviving relatives in the possession and control of decedents' bodies. We do not find this common law concept to be of constitutional dimension.

[2] 2. A right of action existing at common law may be modified or abrogated by the legislature. *Teasley v. Mathis*, 243 Ga. 561, 255 S.E.2d 57 (1979).

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 4 Otto 113, 94 U.S. 113, 134, 24 LE 77 (1876).

3. " 'The preservation of the public health is one of the duties devolving upon the State as a sovereign power. In fact, among all the objects sought to be secured by

governmental laws, none is more important than the preservation of the public health'; . . . 'Health regulations are of the utmost consequence to the general welfare; and if they are reasonable, impartial, and not against the general policy of the State, they must be submitted to by individuals for the good of the public, irrespective of pecuniary loss.' " *Abel v. State,* 64 Ga.App. 448, 452-453, 13 S.E.2d 507 (1941).

[3] Certainly, the General Assembly has it within its power, in the interest of the public welfare, to authorize this procedure, which yearly benefits hundreds of Georgians.

The motions for summary judgment of the hospital and the eye bank should have been granted.

Judgment reversed.

All the Justices concur, except MARSHALL, P.J., who dissents.

MARSHALL, Presiding Justice, dissenting.

While I am heartily in favor of the purpose of the statute in question to provide corneal tissue for transplants, I am constrained to hold that the statute violates the due process provisions of the Constitutions of Georgia and the United States. The statute fails to provide notice to the next of kin and a realistic opportunity to object to the corneal tissue removel, and, therefore, in my opinion, violates the fundamentals of due process.

I respectfully dissent.

Alma TILLMAN, Plaintiff-Appellant,

v.

DETROIT RECEIVING HOSPITAL and University Health Center, a Michigan non-profit corporation, Michigan Eye Bank, a Michigan non-profit corporation and Werner Spitz, M.D., and John Doe and Jack Roe, Defendants-Appellees.

Docket No. 75006.

Court of Appeals of Michigan.

Submitted Aug. 2, 1984.

Decided Nov. 6, 1984.

Released for Publication Jan. 7, 1985.

Mother of decedent brought action against hospital, eye bank, medical examiner and others, alleging that her daughter's corneas and eyes were removed without her consent and in violation of state law. The Wayne Circuit Court, Henry J. Szymanski, J., entered summary judgment for eye bank and medical examiner, and mother appealed. The Court of Appeals, R.B. Burns, J., held that: (1) common-law right of mother to bury daughter without mutilation was not encompassed by constitutional right of privacy, and (2) mother's conjecture that daughter's eyes were removed did not establish genuine issue of material fact in light of affidavits by medical examiner, medical technician who performed corneal excision, and funeral director who embalmed body, all of which indicated that eyes were not removed.

Affirmed.

1. Constitutional Law 82(7)

Only rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the constitutional guaranty of the right of personal privacy.

2. Dead Bodies 1

There is no property right in the next of kin to a dead body.

3. Dead Bodies 9

Person entitled to possession, control or burial of a dead body has common-law cause of action for tort of interference with the right of burial of a deceased person without multilation.

4. Constitutional Law 82(7)

Constitutional right to privacy, which encompasses right to make decisions concerning the integrity of one's body, is a personal one that ends with the death of a person to whom it is of value, and may not be claimed by his estate or his next of kin.

5. Judgment 181(33)

In action by mother of decedent claiming interference with her right to bury her daughter without mutilation, in which constitutionality of cornea removal statute was challenged, mother's conjecture that daughter's eyes were

removed did not establish genuine issue of material fact where affidavits of technician who performed corneal excision procedure, medical examiner who performed autopsy, and funeral director who embalmed and prepared body for viewing indicated that eyes were not removed and that there was no facial disfigurement. M.C.L.A. §§ 333.10201 et seq.

6. Coroners 14

Medical examiner is empowered by statute to retain body portions of autopsy subject for further criminal investigation. M.C.L.A. § 52.205.

Bahr & Bergesen by Edward A. Shuttie, Troy, for plaintiff-appellant.

John D. O'Hair, Corp. Counsel, and Karen G. Watkins, Asst. Corp. Counsel, Detroit, for defendant Wayne County Medical Examiner.

Plukett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C. by William J. Lynch and Christine D. Oldani, Detroit, for defendant-appellee Mich. Eye Bank.

Before HOOD, P.J., and R.B. BURNS and EVERETT*, JJ.

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* Stanley Everett, 37th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const.1963, Art. 6, Sec. 23, as amended 1968.

R.B. BURNS, Judge.

Plaintiff's daughter, Mary Catherine Tillman, was admitted to Detroit Receiving Hospital and University Health Center on December 25, 1982. She died at approximately 7:44 p.m. that evening. An autopsy was performed on the body at the Wayne County Morgue on December 26, 1982. The cause of death was listed as an accidental gunshot wound to the back.

Plaintiff filed a complaint in the Wayne County Circuit Court against Detroit Receiving Hospital and University Health Center, the Michigan Eye Bank, Wayne County Medical Examiner Dr. Werner Spitz, and two unknown individuals, alleging that her daughter's corneas and eyes were removed without her consent and in violation of state law.[1] Each of the named defendants individually filed a motion for summary judgment under GCR 1963, 117.2(3).

On October 21, 1983, the trial court granted the motions on behalf of defendants Michigan Eye Bank and the Wayne County Medical Examiner.[2] In a bench opinion the court ruled that, other than plaintiff's own assumptions, plaintiff had failed to produce any evidence to prove that the decedent's eyes were removed. The court also found that the medical examiner's function in this case cloaked constitutionality of the cornea removal statute,

---

1. In the lower court, plaintiff also alleged damages for the unauthorized removal of decedent's brain and for malpractice. Apparently, those alegations have been dropped on appeal.

2. Detroit Receiving Hospital and University Health Center was dismissed as a party-defendant by stipulation of the parties and by order dated October 24, 1983.

M.C.L. § 333.10201 *et seq.;* M.S.A. § 14.15(10201) *et seq.,* was without merit. Plaintiff appeals and we affirm.

The portion of the statute relevant to this appeal states:

> "(1) In any case in which an autopsy is to be done by a county medical examiner or a county medical examiner causes an autopsy to be done, the cornea of the deceased person may be removed by a person authorized by the county medical examiner.
>
> "(2) Removal under subsection (1) may be made only under the following circumstances:
>
> "(a) An autopsy has already been authorized by the county medical examiner.
>
> "(b) The county medical examiner does not have knowledge of an objection by the next of kin of the decedent to the removal of the cornea.
>
> "(c) The removal of the cornea will not interfere with the course of any subsequent investigation or autopsy or alter post-mortem facial appearance." M.C.L. § 333.10202; M.S.A. § 14.15(10202).
>
> "The county medical examiner, the assistant county medical examiner, a bank or storage facility, or any person authorized by the county medical examiner to remove the cornea of a deceased person, shall not be liable in a civil action if it is subsequently alleged that authorization for the removal was required of the next of kin." M.C.L. § 333.10203; M.S.A. § 14.15 (10203).

Plaintiff claims this statute is an unconstitutional invasion of the right of privacy.

[1-3] The threshold question is whether plaintiff has privacy rights which are implicated here. Only rights that can be deemed "fundamental" or "implicit in the con-

cept of ordered liberty" are included in the guaranty of the right of personal privacy. *Roe v. Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10),* 396 Mich. 465, 505, 242 N.W.2d 3 (1976). Plaintiff claims that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation. While there is no property right in the next of kin to a dead body, *Deeg v. Detroit,* 345 Mich. 371, 375, 76 N.W.2d 16 (1956), Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation. *Id.*

[4] We do not find this common law right to be of constitutional dimension. The privacy right encompasses the right to make decisions concerning the integrity of one's body. *Roe v. Wade, supra.* This right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin. *Hubenschmidt v. Shears,* 403 Mich. 486, 489, 270 N.W.2d 2 (1978); *McLean v. Rogers,* 100 Mich. App. 734, 737, 300 N.W.2d 389 (1980). Accordingly, we reject plaintiff's constitutional challenge predicated on the right to privacy.

Plaintiff next contends that the trial court erred in finding there was no genuine issue of material fact that (1) the eyes of plaintiff's decedent were removed or that (2) the corneas of plaintiff's decedent were removed in such a way as to alter her post-mortem facial appearance.

In *Maccabees Mutual Life Ins. Co. v. Dep't. of Treasury,* 122 Mich.App. 660, 662-663, 332 N.W.2d 561 (1983), the standard of review is summarized:

> "GCR 1963, 117.2(3), allows the trial court to grant summary judment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Szidik v Podsiadlo,* 109 Mich App 446, 448-449; 311 NW2d 386 (1981). A motion based on this subrule is designed to test whether there is factual support for a claim. *Partrich v Muscat,* 84 Mich App 724, 730; 270 NW2d 506 (1978). The court must consider the pleadings, affidavits and other available evidence and be satisfied that the claim asserted cannot be supported by any evidence at trial. *Jacobs v Detroit Automobile Inter-Ins Exchange,* 107 Mich App 424, 432; 309 NW2d 627 (1981), *lv den* 414 Mich 872 (1982). The court must be satisfied that it is impossible for the claim to be supported at trial because of some deficiency which cannot be overcome. *Rizzo v Kretschmer,* 389 Mich 363, 372; 207 NW2d 316 (1973). The court must give the benefit of any reasonable doubt to the opposing party and inferences are to be drawn in favor of the one opposing the motion. *Littsey v Wayne State University Bd of Governors,* 108 Mich App 406, 416; 310 NW2d 399 (1981), *lv den* 413 Mich 882 (1982). A party opposing the motion for summary judgment has the burden to come forward with some evidentiary proof that a genuine issue of fact does exist. If the opposing party fails to do so, the motion for summary judgment is property granted. *Durant v Stahlin,* 375 Mich 628, 640; 135 NW2d 392 (1965)."

[5] Defendants filed three affidavits with their motions for summary judgment. Technician Pandora Andrews in her affidavit stated that on December 26, 1982, at 12:30 a.m. she performed a corneal tissue excision on

plaintiff's decedent after receiving authorization of the county medical examiner's office. She removed corneal tissue one-half millimeter in thickness and this did not alter the facial appearance of the corpse. She did not remove the eyes or brain. At the time she performed the corneal tissue excision, Andrews had no knowledge of any objection by the deceased's next of kin.

In his affidavit, defendant Werner Spitz stated that he knew of no objection of the next of kin when he authorized the removal of the corneas of plaintiff's decedent. He averred that he made the decision to conduct an autopsy prior to giving corneal removal authorization and that the corneas but not the eyes were removed prior to the autopsy. He stated that, in reviewing notes subsequent to the autopsy, he noticed on both the manuscript and diagram references to the removal of decedent's eyes. These references were in error because only decedent's corneas had been removed. When the body was released to the funeral home, decedent's facial appearance was unaltered.

The affidavit of Raymond Cantrell, funeral director, states that he embalmed and prepared for viewing the body of plaintiff's decedent. In so doing he did not perform an eye-socket buildup procedure which would have been imperative had the deceased's eyes been removed.

With the filing of these affidavits, it became incumbent on plaintiff to come forth with evidence to create a disputed issue of fact, *i.e.*, that her decedent's eyes were removed or facial appearance was altered. *Durant v. Stahlin, supra.*

The affidavits of Paula Lombard, decedent's sister, and Rhonda Tillman, decedent's sister-in-law, and plaintiff aver that they personally observed decedent in her coffin and that her eyes were sunken. Plaintiff and Rhonda Tillman also stated that they had telephoned the medical examiner's office and unidentified persons told them that decedent's eyes had been removed. Photographs taken of decedent in her coffin were also admitted.

The trial court was correct. Met with affidavits of the technician who performed the corneal excision procedure, the medical examiner who performed the autopsy, and the funeral director who embalmed and prepared the body for viewing—each of whom stated the eyes of plaintiff's decedent were not removed and there was no disfigurement—plaintiff presented no evidence to rebut this and raise a question of fact. Mere conjecture does not meet the burden to come forward with evidentiary proof to establish that there exists a genuine issue of material fact. *Szidik v. Podsiadlo,* 109 Mich.App. 446, 451, 311 N.W.2d 386 (1981). Accordingly, the trial court's grant of summary judgment is affirmed.

[6] Even assuming that plaintiff's allegations are true and that the eyes of her decedent were removed, a medical examiner may retain body portions for further criminal investigation. M.C.L. § 52.205; M.S.A. § 5.953(5); *Allinger v. Kell,* 102 Mich.App. 798, 302 N.W.2d 576 (1981). Recognizing that she is unable to explain why a medical examiner who may statutorily retain body parts would find it necessary to, as plaintiff alleges, "alter" diagrams to "cover up" the fact that the eyes were removed, plaintiff now claims additional discovery time is

needed to reveal the medical examiner's motives. Plaintiff did not request additional time for discovery at the trial court level and we will not consider this claim.

Affirmed.

(3)

Supreme Court, U.S.
FILED
APR 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO: 86-1536

Supreme Court of the United States

October Term, 1986

WADE POWELL AND FREDA POWELL, HIS WIFE, AND ERWIN WHITE AND SUSAN WHITE, HIS WIFE, Petitioners,

v.

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, M.D., NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does removal of the corneae of a decedent, without the consent of the next of kin, authorized by State law, violate any fundamental rights of privacy or personal liberty guaranteed by the Due Process Clause?

2. If no constitutional rights of fundamental magnitude are involved, are there any rights created by State law, to which the safeguards of procedural due process apply and which would be violated by removal of corneae from a decedent without the consent of the next of kin?

PARTIES BELOW

The parties, Petitioners and Respondents, are correctly identified in the Petition (i-ii), except that William H. Shutze, M.D. and Thomas M. Techman,

M.D., are, respectively, the Fifth District Medical Examiner, and Associate District Medical Examiner, for the State of Florida.

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REASONS WHY THE PETITION SHOULD BE DENIED

I. NEITHER THE DECISIONS OF THIS COURT, NOR THE RECORD IN THESE CASES, WARRANT THE COURT'S EXPANDING THE FUNDAMENTAL RIGHTS SECURED BY THE CONSTITUTION TO INCLUDE PETITIONERS' INTEREST IN THEIR DECEASED SONS' BODIES.

The overall question raised by the Petition for Writ of Certiorari is whether the right of family members to possess and dispose of their decedents' remains is one of constitutional magnitude, so that a need exists for federal-law uniformity among the states. If not, then the matter of sepulture interests, and the protections and limitations of those interests, are properly questions of state law, to be determined variably as the differing states see fit.

Petitioners assert that the interest at stake in these consolidated cases is that of surviving family members' reverence

for the dead (Petition at 20, 21). They assert that this interest is one of constitutional magnitude, embedded in the core of fundamental, substantive protection afforded by the Due Process Clause (id. at 13-14, 17).

Citing no applicable authority from this Court, however, Petitioners claim that this interest is a fundamental constitutional right (1) because it is historically and traditionally among matters of personal choice involved in family life (id. at 15, 16, 17, 21); and (2) because it is among religious and conscientious values, all protectable

through the Due Process Clause.[1] The Petition for Certiorari, in short, is a request for the Court to establish a new, fundamental constitutional right.

1. Petitioners concede that this is precisely the same argument considered and rejected by the Florida Supreme Court (Petition at 18-20).

> We reject appellees' [petitioners'] argument. The cases cited recognize only freedom of choice concerning personal matters involved in existing, ongoing

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[1]The First Amendment safeguard of religious faith, through the Free Exercise Clause, is applicable to the states by means of the Due Process Clause of the Fourteenth Amendment. Hobbie v. Unemployment Appeals Commission of Fla., ___ U.S. ____, 107 S.Ct. 1046, 1048 (1987); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948); Cantwell v. Connecticut, 311 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940).

> relationships among living persons as fundamental or essential to the pursuit of happiness by free persons. We find that the right of the next of kin to a tort claim for interference with burial, established by this Court ... does not rise to the constitutional dimension of a fundamental right traditionally protected under either the United States or Florida Constitution.

Florida v. Powell, 497 So.2d 1188, 1193 (Fla. 1986) (A-31) (emphasis added).

The Florida Supreme Court's analysis of this Court's decisions, recognizing constitutional rights as fundamental and essential to the orderly pursuit of happiness by free persons, was correct as a matter of federal law. This Court has limited that heightened constitutional protection to highly personal relationships among living persons. This Court's

decisions, refusing to extend this scope of constitutional protection to other relationships in the range of human experiences, emphasize the restricted realm of fundamental rights. See, e.g., Bowers v. Hardwick, ___ U.S. _____, 106 S.Ct. 2841, 2843-44, 2846 (1986); Regents v. Ewing, ___ U.S. _____, 106 S.Ct. 507, 515-16 (1985) (Powell, J., concurring); Roberts v. United States Jaycees, ___ U.S. _____, 104 S.Ct. 3244, 3250-51 (1984); Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844-45, 97 S.Ct. 2994, 2109-10, 53 L.Ed.2d 14 (1977).

Courts of other states have upheld their similar statutes against like attacks that they infringed fundamental constitutional rights. In Tillman v. Detroit Receiving Hospital, 138

Mich.App. 683, 360 N.W.2d 275 (1984), the Court rejected the plaintiff's claim "that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation," id. at 277; and that the Michigan statute violated that right.

> The threshold question is whether plaintiff has privacy rights which are implicated here. Only rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in the guaranty of the right of personal privacy. ...
>
> We do not find this common law right ["to the possession, control, or burial of a dead body"] to be of constitutional dimension. The privacy right encompasses the right to make decisions concerning the integrity of one's body. ... This

> right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin.

Id. at 277 (A-31). Similarly, the Georgia Supreme Court flatly announced that it did "not find this common law concept to be of constitutional dimension." Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60, 335 S.E.2d 127, 128 (1985), cert. denied __ U.S. ____, 106 S.Ct. 1464, 89 L.Ed.2d 721 (1986) (A-19).

Contrary to Petitioners' contention (Petition at 15-17), history and tradition indicate that the sepulture interests of surviving family members in their decedents' bodies, is not a right "long recognized at common law as essential to the orderly pursuit of happiness by free men," Meyer v. Nebraska, 262 U.S. 390, 399, 43

S.Ct. 625, 626 (1923). English common law accorded no property or other rights in the body of a deceased person. See, e.g., Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d at 128; Jackson v. Rupp, 228 So.2d 916, 918 (Fla. 4th D.C.A. 1969), aff'd 238 So.2d 86 (Fla. 1970).

In fact, this is simply one facet of an entire field of human activity that has historically and traditionally been regulated by the individual states, under the powers reserved to them by the Tenth Amendment. Cf. United States v. Darby, 312 U.S. 100, 123-24, 61 S.Ct. 451, 462 (1941); United States v. Sprague, 282 U.S. 716, 733-34, 51 S.Ct. 220, 222-23 (1931). Whether or not a decedent's own body is disposed of in accordance with his wishes and directions is a matter controlled by state law. Likewise, the conditions

under which a dead body may be disposed of are governed by state law.[2] The authority to perform autopsies -- massive intrusions -- on decedents' bodies is provided by state law.[3] Even the liability for interfering with, or mutilating, a dead body is a creature of state law. Florida v. Powell, 497 So.2d at 1191-92; Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d

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[2]For example, Florida law establishes conditions pertaining to (1) cremation, Fla. Stat. §872.03; (2) interment, Fla. Stat. §382.14; (3) transit for burial, Fla. Stat. §382.061; (4) testimentary donations of bodies and body parts, Fla. Stat. §§245.11, 732.912, 732.914, 732.916, 732.917; and (5) disposition and use of unclaimed bodies, Fla. Stat. §245.06 et seq.

[3]Fla. Stat. §406.11, authorizing medical examiners to perform autopsies under specified circumstances of death, was upheld by the trial court as constitutional, over Petitioners' challenge, and has been left unreviewed on appeal. Florida v. Powell, 497 So.2d at 1190 n.2 (A-31).

at 128; Tillman v. Detroit Receiving Hospital, 360 N.W.2d at 277.

Although, like other interests governed by state law, possessing and disposing of the bodies of their decedents is a significant concern to surviving family members, that does not make it one of constitutional character, much less among the fundamental freedoms substantively guaranteed by the Due Process Clause. Were it otherwise, the essential liberty secured by the Due Process Clause would be engulfed by every serious concern encountered in human experience: when every interest is basic, none is truly fundamental.

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable

and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Bowers v. Hardwick, ___ U.S. ____ at ____, 106 S.Ct. at 2846.

2. There is an important difference, bypassed by Petitioners, in whether the interest which they press the Court to recognize as fundamental is based upon precepts of individual religious faith, or is (as with Petitioners here) simply an individual "matter of conscience" (Petition at 24). While the nature of religious tenets and beliefs may differ, they are all entitled to the same strict-scrutiny protection of the First Amendment, regardless of the particular principles involved. Hobbie v. Unemployment Appeals Commission of Fla., ___ U.S. at ____, 107 S.Ct. at 1049-50, 1051 n.9; United States v. Ballard, 322 U.S. 78, 87, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944).

> The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that '[t]he essence of all that has been said and written on the subject is that only those interests of the highest order...can overbalance legitimate claims to the free exercise of religion.' [quoting Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)].

Thomas v. Review Board of Indiana Employment Security Div., 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981).

While "religious beliefs need not be acceptable, logical, consistent, or

comprehensible to others in order to merit First Amendment protection," id. at 714, 101 S.Ct. at 1430, they must, nonetheless, be religious beliefs. "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." Id. at 713, 101 S.Ct. at 1430. Differing beliefs and values based simply on matters of varying, individual conscience, however, are not entitled to that same bulwark of protection by the Free Exercise Clause of the First Amendment. See, e.g., Wisconsin v. Yoder, 406 U.S. at 216, 92 S.Ct. at 1533:

> Thus, if [parties] asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his

> time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Without an anchor in precepts of religious faith, Petitioners' "conscientious values," and their "conscientious objection" to the Florida cornea removal statute, Fla. Stat. §732.9185 (Petition at 22, 23), do not qualify for the strict scrutiny, and compelling interest to overbalance them, that the Free Exercise Clause requires.

The Florida Supreme Court recognized the importance of the distinction between religious beliefs, and matters of individual conscience, when it rejected Petitioners' claim of fundamental right implicitly based on the Free Exercise Clause.

> The record contains no evidence that the Appellees' [Petitioners'] objections to the removal of corneal tissues for human transplants are based on any 'fundamental tenets of their religious beliefs.' Wisconsin v. Yoder, 406 U.S. at 218, 92 S.Ct. at 1534. '[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.' Id. at 215-16, S.Ct. at 1533.

Florida v. Powell, 497 So.2d at 1193. The evidentiary void in the record that led the Florida Supreme Court to reject any Free Exercise Clause basis for Petitioners' claim, would necessarily compel the same conclusion from this Court.

II. THE FLORIDA SUPREME COURT'S RULING THAT PETITIONERS, AS NEXT OF KIN, HAVE NO LIBERTY OR PROPERTY INTEREST UNDER FLORIDA LAW IN THE REMAINS OF THEIR DECEDENTS IS AN INTERPRETATION OF THE FLORIDA CORNEA REMOVAL STATUTE THAT PRECLUDES THIS COURT FROM RULING CONTRARIWISE.

Petitioners attempt to bootstrap themselves into a position where the procedural safeguards of the Due Process Clause would apply. To do that, however, they necessarily ask this Court to do what it may not -- to disregard the construction by the Florida Supreme Court of Florida Law, including the Florida cornea removal statute, Fla. Stat. §732.9185.

Petitioners cite authorities for the proposition that, to be protected by the procedural requirements of due process, liberty interests, like property interests, "may arise from state law." [Petition at 27 n.13]. They then argue that the Florida cornea removal statute may be

interpreted so as to confer upon the next of kin (such as Petitioners) a liberty interest in objecting to the removal of corneal tissue from the body of a deceased: "the statute clearly recognizes a right to object, and that right is protected by due process of law" (Petition at 27).

Petitioners candidly concede, however, that the Florida Supreme Court did not so construe that statute: "It was not read that way below" (Petition at 27). Indeed, the Supreme Court of Florida expressly concluded that Petitioners "have no protectable liberty or property interest in the remains of their decedents," and that therefore the question of whether the "procedural safeguards guaranteed by the due process clause" were met simply did

not arise. 497 So.2d at 1193 (A-31).[4]

That interpretation of Florida law, including the statute in question, is binding upon this Court. New York v. Ferber, 458 U.S. 747, 769 n.24, 102 S.Ct. 3348, 3361 n.24, 73 L.Ed.2d 1113 (1982); Hortonville Joint School District No.1 v. Hortonville Education Ass'n, 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49

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[4]Because the interpretation of state law by the state courts may eliminate any need to consider issues involved in federal constitutional challenges to state law, it is appropriate to defer decisions on the federal issues until a state court construction has been made. See, e.g., Harrison v. NAACP, 360 U.S. 167, 176-77, 79 S.Ct. 1025, 1030 (1959); Albertson v. Millard, 345 U.S. 242, 245, 73 S.Ct. 600, 602 (1953). Cf. United States v. Little Lake Misere Land Co., 412 U.S. 580, 605, 93 S.Ct. 2389, 2403 (1973) (Stewart, J., concurring in judgment). The wisdom of this principle is confirmed by the case at hand, since the Florida Supreme Court's interpretation of Florida law has obviated any question of Petitioners having an interest protectable by procedural due process.

L.Ed.2d 1 (1976); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688, 79 S.Ct. 1362, 1365 (1959); Albertson v. Millard, 345 U.S. 242, 244, 73 S.Ct. 600, 602 (1953); United States v. Burnison, 339 U.S. 87, 89, 70 S.Ct. 503, 504 (1950); Aero Mayflower Transit Co. v. Board of RR. Commissioners, 332 U.S. 495, 499-500, 68 S.Ct. 167, 169-70 (1947); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 461, 67 S.Ct. 374, 375 (1947). Accordingly, Petitioners' tacit invitation to read into the statute a liberty interest for the next of kin, notwithstanding the contrary view of the Florida Supreme Court, must be declined.

CONCLUSION

The Court should turn away Petitioners' entreaty to create a new, fundamental

constitutional right, and deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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NO: 86-1536

Supreme Court of the United States

October Term, 1986

WADE POWELL AND FREDA POWELL, HIS WIFE, AND ERWIN WHITE AND SUSAN WHITE, HIS WIFE, Petitioners,

v.

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, M.D., NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX TO BRIEF IN OPPOSITION

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138 Mich.App. 683, 360 N.W.2d 275 (Mich.App. 1984)

Alma TILLMAN, Plaintiff-Appellant

v.

DETROIT RECEIVING HOPSITAL and University Health Center, a Michigan non-profit corporation, Michigan Eye Bank, a Michigan non-profit corporation and Werner Spitz, M.D., and John Doe and Jack Roe, Defendants-Appellees.

Docket No. 75006.
Court of Appeals of Michigan.
Submitted Aug. 2, 1984.
Decided Nov. 6, 1984.
Released for Publication Jan. 7, 1985.

Mother of decedent brought action against hospital, eye bank, medical examiner and others, alleging that her daughter's corneas and eyes were removed without her consent and in violation of state law. The Wayne Circuit Court, Henry J. Szymanski, J., entered summary judgment for eye bank and medical examiner, and mother appealed. The Court of Appeals, R.B. Burns, J., held that: (1) common-law

right of mother to bury daughter without mutilation was not encompassed by constitutional right of privacy, and (2) mother's conjecture that daughter's eyes were removed did not establish genuine issue of material fact in light of affidavits by medical examiner, medical technician who performed corneal excision, and funeral director who embalmed body, all of which indicated that eyes were not removed.

Affirmed.

1. Constitutional Law [Key] 82(7)

Only rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the constitutional guaranty of the right of personal privacy.

2. Dead Bodies [Key] 1

There is no property right in the

next of kin to a dead body.

3. Dead Bodies [Key] 9

Person entitled to possession, control or burial of a dead body has common-law cause of action for tort of interference with the right of burial of a deceased person without mutilation.

4. Constitutional Law [Key] 82(7)

Constitutional right to privacy, which encompasses right to make decisions concerning the integrity of one's body, is a personal one that ends with the death of a person to whom it is of value, and may not be claimed by his estate or his next of kin.

5. Judgment [Key] 181(33)

In action by mother of decedent claiming interference with her right to bury her daughter without mutilation, in which constitutionality of cornea removal

statute was challenged, mother's conjecture that daughter's eyes were removed did not establish genuine issue of material fact where affidavits of technician who performed corneal excision procedure, medical examiner who performed autopsy, and funeral director who embalmed and prepared body for viewing indicated that eyes were not removed and that there was no facial disfigurement. M.C.L.A. §§ 333.10201 et seq.

6. Coroners [Key] 14

Medical examiner is empowered by statute to retain body portions of autopsy subject for further criminal investigation. M.C.L.A. § 52.205.

Bahr & Bergesen by Edward A. Shuttle, Troy, for plaintiff-appellant.

John D. O'Hair, Corp. Counsel, and

Karen G. Watkins, Asst. Corp. Counsel, Detroit, for defendant Wayne County Medical Examiner.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C. by William J. Lynch and Christine D. Oldani, Detroit, for defendant-appellee Mich. Eye Bank.

Before HOOD, P.J., and R.B. BURNS and EVERETT*, JJ.

R.B. BURNS, Judge.

Plaintiff's daughter, Mary Catherine Tillman, was admitted to Detroit Receiving Hospital and University Health Center on December 25, 1982. She died at approximately 7:44 p.m. that evening. An autopsy was performed on the body at the Wayne County Morgue on December 26,

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*Stanley Everett, 37th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const. 1963, Art. 6, Sec. 23, as amended 1968.

1982. The cause of death was listed as an accidental gunshot wound to the back.

Plaintiff filed a complaint in the Wayne County Circuit Court against Detroit Receiving Hospital and University Health Center, the Michigan Eye Bank, Wayne County Medical Examiner Dr. Werner Spitz, and two unknown individuals, alleging that her daughter's corneas and eyes were removed without her consent and in violation of state law.[1] Each of the named defendants individually filed a motion for summary judgment under GCR 1963, 117.2(3).

On October 21, 1983, the trial court granted the motions on behalf of defendants Michigan Eye Bank and the Wayne County

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[1]In the lower court, plaintiff also alleged damages for the unauthorized removal of decedent's brain and for malpractice. Apparently, those allegations have been dropped on appeal.

Medical Examiner.[2] In a bench opinion the court ruled that, other than plaintiff's own assumptions, plaintiff had failed to produce any evidence to prove that the decedent's eyes were removed. The court also found that the medical examiner's function in this case cloaked constitutionality of the cornea removal statute, M.C.L. § 333.10201 et seq.; M.S.A. § 14.15(10201) et seq., was without merit. Plaintiff appeals and we affirm.

The portion of the statute relevant to this appeal states:

> (1) In any case in which an autopsy is to be done by a county medical examiner or a county medical examiner causes an autopsy to be done, the cornea of

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[2]Detroit Receiving Hospital and University Health Center was dismissed as a party-defendant by stipulation of the parties and by order dated October 24, 1983.

the deceased person may be removed by a person authorized by the county medical examiner.

(2) Removal under subsection (1) may be made only under the following circumstances:

(a) An autopsy has already been authorized by the county medical examiner.

(b) The county medical examiner does not have knowledge of an objection by the next of kin of the decedent to the removal of the cornea.

(c) The removal of the cornea will not interfere with the course of any subsequent investigation or autopsy or alter post-mortem facial appearance. M.C.L. § 333.10202; M.S.A. § 14.15(10202).

The county medical examiner, the assistant county medical examiner, a bank or storage facility, or any person authorized by the county medical examiner to remove the

> cornea of a deceased person, shall not be liable in a civil action if it is subsequently alleged that authorization for the removal was required of the next of kin. M.C.L. § 333.10203; M.S.A. § 14.15(10203).

Plaintiff claims this statute is an unconstitutional invasion of the right of privacy.

[1-3] The threshold question is whether plaintiff has privacy rights which are implicated here. Only rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guaranty of the right of personal privacy. Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Advisory Opinion on Constitutionality of 1975 PA

227 (Questions 2-10), 396 Mich. 465, 505, 242 N.W.2d 3 (1976). Plaintiff claims that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation. While there is no property right in the next of kin to a dead body, Deeg v. Detroit, 345 Mich. 371, 375, 76 N.W.2d 16 (1956), Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation. Id.

[4] We do not find this common law right to be of constitutional dimension. The privacy right encompasses the right to make decisions concerning the integrity of one's body. Roe v. Wade, supra. This

right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin. Hubenschmidt v. Shears, 403 Mich. 486, 489, 270 N.W.2d 2 (1978); McLean v. Rogers, 100 Mich.App. 734, 737, 300 N.W.2d 389 (1980). Accordingly, we reject plaintiff's constitutional challenge predicated on the right to privacy.

Plaintiff next contends that the trial court erred in finding there was no genuine issue of material fact that (1) the eyes of plaintiff's decedent were removed or that (2) the corneas of plaintiff's decedent were removed in such a way as to alter her post-mortem facial appearance.

In Maccabees Mutual Life Ins. Co. v. Dep't. of Treasury, 122

Mich.App. 660, 662-663, 332 N.W.2d 561 (1983), the standard of review is summarized:

> GCR 1963, 117.2(3), allows the trial court to grant summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Szidik v. Podsiadlo, 109 Mich. App. 446, 448-449; 311 N.W.2d 386 (1981). A motion based on this subrule is designed to test whether there is factual support for a claim. Partrich v. Muscat, 84 Mich.App. 724, 730; 270 N.W.2d 506 (1978). The court must consider the pleadings, affidavits and other available evidence and be satisfied that the claim asserted cannot be supported by any evidence at trial. Jacobs v. Detroit Automobile Inter-Ins Exchange, 107 Mich.App. 424, 432; 309 N.W.2d 627 (1981),

lv den, 414 Mich 872 (1982). The court must be satisfied that it is impossible for the claim to be supported at trial because of some deficiency which cannot be overcome. Rizzo v. Kretschmer, 389 Mich. 363, 372; 207 N.W.2d 316 (1973). The court must give the benefit of any reasonable doubt to the opposing party and inferences are to be drawn in favor of the one opposing the motion. Littsey v. Wayne State University Bd of Governors, 108 Mich. App. 406, 416; 310 N.W.2d 399 (1981), lv den, 413 Mich. 882 (1982). A party opposing the motion for summary judgment has the burden to come forward with some evidentiary proof that a genuine issue of fact does exist. If the opposing party fails to do so, the motion for summary judgment is property granted. Durant v. Stahlin, 375 Mich.

628, 640; 135 N.W.2d 392 (1965).

[5] Defendants filed three affidavits with their motions for summary judgment. Technician Pandora Andrews in her affidavit stated that on December 26, 1982, at 12:30 a.m. she performed a corneal tissue excision on plaintiff's decedent after receiving authorization of the county medical examiner's office. She removed corneal tissue one-half millimeter in thickness and this did not alter the facial appearance of the corpse. She did not remove the eyes or brain. At the time she performed the corneal tissue excision, Andrews had no knowledge of any objection by the deceased's next of kin.

In his affidavit, defendant Werner Spitz stated that he knew of no objection of the next of kin when he authorized the removal of the corneas of plaintiff's

decedent. He averred that he made the decision to conduct an autopsy prior to giving corneal removal authorization and that the corneas but not the eyes were removed prior to the autopsy. He stated that, in reviewing notes subsequent to the autopsy, he noticed on both the manuscript and diagram references to the removal of decedent's eyes. These references were in error because only decedent's corneas had been removed. When the body was released to the funeral home, decedent's facial appearance was unaltered.

The affidavit of Raymond Cantrell, funeral director, states that he embalmed and prepared for viewing the body of plaintiff's decedent. In so doing he did not perform an eye-socket buildup procedure which would have been imperative had the deceased's eyes been removed.

With the filing of these affidavits, it became incumbent on plaintiff to come forth with evidence to create a disputed issue of fact, i.e., that her decedent's eyes were removed or facial appearance was altered. Durant v. Stahlin, supra.

The affidavits of Paula Lombard, decedent's sister, and Rhonda Tillman, decedent's sister-in-law, and plaintiff aver that they personally observed decedent in her coffin and that her eyes were sunken. Plaintiff and Rhonda Tillman also stated that they had telephoned the medical examiner's office and unidentified persons told them that decedent's eyes had been removed. Photographs taken of decedent in her coffin were also admitted.

The trial court was correct. Met with affidavits of the technician who performed the corneal excision procedure,

the medical examiner who performed the autopsy, and the funeral director who embalmed and prepared the body for viewing -- each of whom stated the eyes of plaintiff's decedent were not removed and there was no disfigurement -- plaintiff presented no evidence to rebut this and raise a question of fact. Mere conjecture does not meet the burden to come forward with evidentiary proof to establish that there exists a genuine issue of material fact. Szidik v. Podsiadlo, 109 Mich.App. 446, 451, 311 N.W.2d 386 (1981). Accordingly, the trial court's grant of summary judgment is affirmed.

[6] Even assuming that plaintiff's allegations are true and that the eyes of her decedent were removed, a medical examiner may retain body portions for further criminal investigation. M.C.L. §

52.205; M.S.A. § 5.953(5); Allinger v. Kell, 102 Mich.App. 798, 302 N.W.2d 576 (1981). Recognizing that she is unable to explain why a medical examiner who may statutorily retain body parts would find it necessary to, as plaintiff alleges, "alter" diagrams to "cover up" the fact that the eyes were removed, plaintiff now claims additional discovery time is needed to reveal the medical examiner's motives. Plaintiff did not request additional time for discovery at the trial court level and we will not consider this claim.

Affirmed.

255 Ga. 60, 335 S.E.2d 127, 128 (Ga. 1985), cert.denied ___ U.S. ____, 106 S.Ct. 1464, 89 L.Ed.2d 721 (1986)

GEORGIA LIONS EYE BANK, INC. et al.

v.

LAVANT.

No. 42351.
Supreme Court of Georgia.
Oct. 9, 1985.
Rehearing Denied Oct. 29, 1985.

Mother of infant, who had died of sudden infant death syndrome, brought suit against hospital and an eye bank for the wrongful removal of corneal tissue of infant following death pursuant to statute. The State Court, Chatham County, David R. Elmore, Senior Judge, held that statute authorizing removal for transplant of corneal tissue of decedents violated due process, and appeal was taken. The Supreme Court, Weltner, J., held that:

(1) in Georgia, there is no constitutionally protected right in a decedent's body, and (2) statute authorizing removal for transplant of corneal tissue of decedents if no objection is made by decedent in his life or by his next-of-kin after death is constitutional.

Reversed.

Marshall, P.J., filed dissenting opinion.

1. Constitutional Law [Key] 82(6)

In Georgia, there is no constitutionally protected right in a decedent's body; rather, concept of quasi property recognizes interests of surviving relatives in possession or control of decedent's body, and such common-law concept is not of constitutional dimension.

2. Common Law [Key] 11

Right of action existing at common law

may be modified or abrogated by legislature.

3. Dead Bodies [Key] 1

The General Assembly had it within its power, in interest of public welfare, to authorize removal for transplant of corneal tissue of decedents, and thus, O.C.G.A. § 31-23-6(b)(1), which authorizes such procedure if no objection is made by decedent in his life or by his next-of-kin after death is constitutional. U.S.C.A. Const.Amends. 5, 14.

Kent & Barrow, A. Martin Kent, Stanley M. Karsman, Karsman, Brooks, Painter & Callaway, P.C., Savannah, William B. Gunter, Everette L. Doffermyre, Jr., Constance C. Russell, Kilpatrick & Cody, Atlanta, Joseph B. Brennan, Bouhan, Williams & Levy, Savannah, for Georgia Lions Eye Bank, Inc., et al.

Walter W. Ballew III, Kran Riddle, Calhoun, Hubbard, Riddle & Cox, P.C., Savannah, for Patricia P. Lavant.

WELTNER, Justice.

This appeal is from an order of the State Court of Chatham County holding unconstitutional O.C.G.A. § 31-23-6(b)(1), which authorizes, under specified circumstance,[1] removal for transplant of the corneal tissue of decedents if no objection is made by the decedent in his life or by his next-of-kin after death.

This law was enacted by a virtually unanimous General Assembly in 1978. The record indicates that before its passage,

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[1]O.C.G.A. § 45-16-27(a)(1) provides, in part, that coroners shall require a post-mortem examination or autopsy when any person dies "suddenly when in apparent good health."

approximately 25 corneal transplants were performed each year. In 1984, however, more than 1000 persons regained their sight through transplants.

Pursuant to this Code section, officials of the Georgia Lions Eye Bank emoved during autopsy the corneal tissue of an infant, who had died of sudden infant death syndrome. While the parents of the infant did not object, there was no notice of the intended removal, nor any realistic opportunity to object. Sometime later, the mother discovered for the first time that the corneal tissue had been removed. She brought suit against St. Joseph's Hospital and the Georgia Lions Eye Bank for the wrongful removal of the tissue.

The court held the statute violative of due process in that it deprives a

person of a property right in the corpse of his next-of-kin, and fails to provide notice and an opportunity to object.

1. In the earlier days of the common law, so Blackstone avers, no property right existed relative to a dead body, and matters concerning corpses were left to the ecclesiastical courts. "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried." 2 W. Blackstone, Commentaries *429 (T. Cooley, ed. 1899).

Because there were no ecclesiastical courts in this country to resolve matters relating to corpses, the courts conceived

the notion of "quasi-property right," when referring to the interest of relatives in the bodies of their next-of-kin. Dean Prosser noted: "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." W.L. Prosser and W.P. Keeton, Prosser and Keeton on Torts, p.63 (5th ed. 1984).

In Georgia, an early case considering this interest of next-of-kin is Louisville Railroad Co. v. Wilson, 123 Ga. 62, 51 S.E. 24 (1905). The precise nature of the interest was never defined, although we held that some type of claim was stated. However, in Pollard v. Phelps, 56 Ga.App. 408, 415, 193 S.E. 102, 107

(1937), the court held that "[a]t common law no property right was held to exist in a dead body; and though this view is still maintained in a strict sense, the courts of civilized and Christian countries regard respect for the dead as not only a virtue but a duty, and hold that, in the absence of testamentary disposition, a quasi property right belongs to the husband or wife, and, if neither, to the next of kin." See also Rivers v. Greenwood Cemetery, Inc., 194 Ga. 524, 525, 22 S.E.2d 134 (1942), wherein we held "that a dead body is quasi property over which the relatives of the deceased have rights which the courts will protect."

[1] Thus, it can be seen that in Georgia, there is no constitutionally protected right in a decedent's body. Rather, the courts have evolved the

concept of quasi property in recognition of the interests of surviving relatives in the possession and control of decedents' bodies. We do not find this common law concept to be of constitutional dimension.

[2] 2. A right of action existing at common law may be modified or abrogated by the legislature. Teasley v. Mathis, 243 Ga. 561, 255 S.E.2d 57 (1979).

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the

great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Munn v. Illinois, 4 Otto 113, 94 U.S. 113, 134, 24 L.E. 77 (1876).

3. "'The preservation of the public health is one of the duties devolving upon the State as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important than the preservation of the public health'; ... 'Health regulations are of the utmost consequence to the general welfare; and if they are reasonable, impartial, and not against the general policy of the State, they must be submitted to by individuals for the good of the public, irrespective of pecuniary loss.'" Abel v. State, 64 Ga.App. 448, 452-453, 13

S.E.2d 507 (1941).

[3] Certainly, the General Assembly has it within its power, in the interest of the public welfare, to authorize this procedure, which yearly benefits hundreds of Georgians.

The motions for summary judgment of the hospital and the eye bank should have been granted.

Judgment reversed.

All the Justices concur, except MARSHALL, P.J., who dissents.

MARSHALL, Presiding Justice, dissenting.

While I am heartily in favor of the purpose of the statute in question to provide corneal tissue for transplants, I am constrained to hold that the statute violates the due process provisions of the Constitutions of Georgia and the United

States. The statute fails to provide notice to the next of kin and a realistic opportunity to object to the corneal tissue removal, and, therefore, in my opinion, violates the fundamentals of due process.

I respectfully dissent.

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255 Ga. 60, 335 S.E.2d 127, 128 (Ga. 1985), cert.denied ___ U.S. ____, 106 S.Ct. 1464, 89 L.Ed.2d 721 (1986)

Patricia P. LAVANT, petitioner, v. ST. JOSEPH'S HOSPITAL and Georgia Lions Eye Bank, Inc. No. 85-1264.

Case below, Georgia Lions Eye Bank, Incorporated v. Lavant, 255 Ga. 60, 335 S.E.2d 127.

Petition for writ of certiorari to the Supreme Court of Georgia.

March 24, 1986. Denied.

497 So.2d 1188 (Fla. 1986)

STATE OF FLORIDA, et al., Appellants,

v.

Wade POWELL, et ux., et al., Appellees.

No. 67755.
Supreme Court of Florida.
Oct. 30, 1986.
Rehearing Denied Dec. 22, 1986.

Petition was filed to review an order of the Circuit Court, Marion County, William T. Swigert, J., finding unconstitutional statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when the tissue is needed for transplantation. The District Court of Appeal certified that the case presented a quesiton requiring immediate resolution. The Supreme Court, Overton, J., held that statute rationally promotes permissible state objective of restoring sight to the

blind and is thus constitutional.

Reversed and remanded.

Shaw, J., filed a dissenting opinion.

1. Dead Bodies [Key] 1

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation rationally promotes permissible state objective of restoring sight to the blind and is thus constitutional. West's F.S.A. § 732.9185.

2. Eminent Domain [Key] 2(1.1)

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation does not effect taking of private property by state action for nonpublic purpose in violation of State Constitution. West's

F.S.A. Const. Art. 5, § 3(b)(5); Art. 10, § 6; West's F.S.A. § 732.9185.

3. Constitutional Law [Key] 82(6)

Right of next of kin to tort claim for interference with burial does not rise to constitutional dimension of fundamental right traditionally protected by Constitution.

4. Constitutional Law [Key] 225.1
Dead Bodies [Key] 1

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation does not create invidious classification regarding next of kin of deceased persons, and thus, does not violate equal protection clause. West's F.S.A. § 732.9185; West's F.S.A. Const. Art. 5, § 3(b)(5); U.S.C.A. Const. Amend. 14.

Jim Smith, Atty. Gen. and Kenneth McLaughlin, Asst. Atty. Gen., Tallahassee, for State of Florida.

Alan C. Sundberg, George N. Meros, Jr. and F. Townsend Hawkes of Carlton, Fields, Ward, Emmanuel, Smith and Cutler, Tallahassee, for Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc., and Florida Lions Eye Bank, Inc.

Andrew G. Pattillo, Jr. and Russell W. LaPeer of Pattillo and McKeever, Ocala, for William H. Shutze, M.D., Thomas M. Techman, M.D., and Keith Gauger.

Craig A. Dennis of Perkins & Collins, Tallahassee, for Florida Society of Ophthalmology, Inc.

Donald W. Weidner, Associate Gen. Counsel, Jacksonville, for Florida Medical Association, Inc.

Robert A. Ginsburg, Dade Co. Atty. and

Robert L. Blake, Asst. Co. Atty., Public Health Division, Jackson Memorial Hospital, Miami, for Dade County, intervenor.

Jerome J. Bornstein and Mark P. Lang, Staff Counsel, American Civil Liberties, Orlando, and Stephen T. Maher, American Civil Liberties Union Foundation of Florida, Inc., University of Miami School of Law, Coral Gables, for Wade Powell and Freda Powell.

James T. Reich, and Jack Singbush of Jack Singbush, P.A., Ocala, for Erwin White and Susan White.

Frederick H. von Unwerth of Kilpatrick & Cody, Washington, D.C., for the Eye Bank Association of America, Inc., amicus curiae.

Melinda L. McNichols of Arky, Freed, Stearns, Watson, Greer and Weaver, P.A., Miami, for Reverand Thomas J. Price, amicus curiae.

Benedict P. Kuehne of Bierman, Sonnett, Shohat and Sale, P.A., Miami, for the Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, PH.D., amicus curiae.

OVERTON, Justice.

This is a petition to review a circuit court order finding unconstitutional section 732.9185, Florida Statutes (1983), which authorizes medical examiners to remove corneal tissue from decedents during statutorily required autopsies when such tissue is needed for transplantation. The statute prohibits the removal of the corneal tissue if the next of kin objects, but does not require that the decedent's next of kin be notified of the procedure. The Fifth District Court of Appeal certified that this case presents a question of great public importance requiring immediate

resolution by this Court. We accept jurisdiction pursuant to article V, section 3(b)(5), Florida Constitution, and, for the reasons expressed below, find that the statute is constitutional.

The challenged statute provides:

> Corneal removal by medical examiners.--
>
> (1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under s. 732.918, provide the cornea of a decedent whenever all of the following conditions are met:
>
> (a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance

> with s. 406.11.
>
> (b) No objection by the next of kin of the decedent is known by the medical examiner.
>
> (c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.
>
> (2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under s. 732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

The trial court decided this case by summary jdugment. The facts are not in dispute. On June 15, 1983, James White drowned while swimming at the city beach in Dunellon, Florida. Associate Medical Examiner Dr. Thomas Techman, who is an appellant in this cause, performed an autopsy on James' body at Leesburg Community

Hospital. On July 11, 1983, Anthony Powell died in a motor vehicle accident in Marion County. Medical Examiner Dr. William H. Shutze, who is also an appellant in this cause, performed an autopsy on Anthony's body. In each instance, under the authority of section 732.9185, the medical examiner removed corneal tissue from the decedent without giving notice to or obtaining consent from the parents of the decedent.

James' and Anthony's parents, who are the appellees in this case, each brought an action claiming damages for the alleged wrongful removal of their sons' corneas and seeking a judgment declaring

section 732.9185 unconstitutional.[1] The actions were subsequently consolidated.

In its judgment, the trial court noted that section 732.9185 "has as its purpose the commendable and laudable objective of providing high quality cornea tissue to those in need of same," but declared the statute unconstitutional on the grounds that it (1) deprives survivors

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[1]The Whites named as defendants Shutze, Techman, Keith Gauger, who is an investigator for the medical examiner's office in that district, and the State of Florida. The Powells named as defendants Shutze and the Monroe [sic] Regional Medical Center. Dade County, The Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc., Florida Lions Eye Bank, Inc., Florida Medical Association, Inc., Florida Society of Ophthalmology, Inc., and Eye Bank Association of America, Inc., were each permitted to intervene as parties in support of the constitutionality of section 732.9185. The Reverend Thomas J. Price of the Florida Conference of United Methodist Churches and the Rabbinical Association of Greater Miami filed amicus briefs in support of the appellees' position.

of their fundamental personal and property right to dispose of their deceased next of kin in the same condition as lawful autopsies left them, without procedural or substantive due process of law; (2) creates an invidious classification which deprives survivors of their right to equal protection; and (3) permits a taking of private property by state action for a non-public purpose, in violation of article X, section 6(a), of the Florida Constitution. The court concluded that the state has no compelling interest in non-consensual removal of appellees' decedents' corneal tissue that outweighs the survivors' right to dispose of their sons' bodies in the condition death left

them.[2] For the reasons expressed below, we reject these findings.

In addressing the issue of the statute's constitutionality, we begin with the premise that a person's constitutional rights terminate at death. See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), cert. denied, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981); Guyton v. Phillips, 606 F.2d 248 (9th Cir. 1979), cert. denied, 445 U.S. 916, 100 S.Ct. 1276, 63 L.Ed.2d 600 (1980). If any rights exist, they belong to the decedent's next of kin.

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[2]The appellees also challenged as unconstitutional § 406.11, Fla.Stat. (1983), which provides medical examiners with the authority to perform autopsies under circumstances enumerated in the statute. The trial court upheld that statutory provision, and that finding is not challenged in this proceeding.

Next, we recognize that a legislative act carries with it the presumption of validity and the party challenging a statute's constitutionality must carry the burden of establishing that the statute bears no reasonable relation to a permissible legislative objective. Johns v. May, 402 So.2d 1166 (Fla. 1981). See also Harrah Independent School District v. Martin, 440 U.S. 194, 198, 99 S.Ct. 1062, 1064, 59 L.Ed.2d 248 (1979). In determining whether a permissible legislative objective exists, we must review the evidence arising from the record in this case.

The unrebutted evidence in this record establishes that the State of Florida spends approximately $138 milion each year to provide its blind with the basic necessities of life. At present, approxiamtely ten percent of Florida's

blind citizens are candidates for cornea transplantation, which has become a highly effective procedure for restoring sight to the functionally blind. As advances are made in the field, the number of surgical candidates will increase, thereby raising the demand for suitable corneal tissue. The increasing number of elderly persons in our population has also created a great demand for corneas because corneal blindness often is age-related. Further, an affidavit in the record states:

> Corneal transplants are particularly important in newborns. The brain does not learn to see if the cornea is not clear. There is a critical period in the first few months of life when the brain 'learns to see.' If the cornea is not clear, the brain not only does not 'learn to see,' but the brain loses its ability to

> 'learn to see.' Hence, corneal transplant in children must be made as soon as practicable after the problem is discovered. Without the medical examiner legislation, there would be virtually no corneal tissue available for infants and these children would remain forever blind.

The record reflects that the key to successful corneal transplantation is the availability of high-quality corneal tissue and that corneal tissue removed more than ten hours after death is generally unsuitable for transplantation. The implementation of section 732.9185 in 1977 has, indisputably, increased both the supply and quality of tissue available for transplantation. Statistics show that, in 1976, only 500 corneas were obtained in Florida for transplantation while, in 1985, more than 3,000 persons in Florida

had their sight restored through corneal transplantation surgery.

The record also demonstrates that a qualitative difference exists between corneal tissue obtained through outright donation and tissue obtained pursuant to section 732.9185. In contrast to the tissue donated by individuals, which is largely unusable because of the advanced age of the donor at death, approximately eighty to eighty-five percent of tissue obtained through medical examiners is suitable for transplantation. The evidence establishes that this increase in the quantity and quality of available corneal tissue was brought about by passage of the statute and is, in large part, attributable to the fact that section 732.9185 does not place a duty upon medical examiners to seek out the next of kin to obtain consent

for cornea removal. An affidavit in the record reveals that, before legislation authorized medical examiners in California to remove corneas without the consent of the next of kin, the majority of the families asked by the Los Angeles medical examiner's office responded positively; however, approximately eighty percent of the families could not be located in sufficient time for medical examiners to remove usable corneal tissue from the decedents.

An autopsy is a surgical dissection of the body; it necessarily results in a massive intrusion into the decedent. This record reflects that cornea removal, by comparison, requires an infinitesimally small intrusion which does not affect the decedent's appearance. With or without cornea removal, the decedent's eyes must

be capped to maintain a normal appearance.

Our review of section 732.9185 reveals certain safeguards which are apparently designed to limit cornea removal to instances in which the public's interest is greatest and the impact on the next of kin the least: corneas may be removed only if the decedent is under the jurisdiction of the medical examiner; an autopsy is mandated by Florida law; and the removal will not interfere with the autopsy or an investigation of the death. Further, medical examiners may not automatically remove tissue from all decedents subject to autopsy; rather, a request must be made by an eye bank based on a present need for the tissue.

[1] We conclude that this record clearly establishes that this statute reasonably achieves the permissible

legislative objective of providing sight to many of Florida's blind citizens.

We next address the trial court's finding that section 732.9185 deprives appellees of a fundamental property right. All authorities generally agree that the next of kin have no property right in the remains of a decedent. Although, in Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941), this Court held that a surviving husband had a "property right" in his wife's body which would sustain a claim for negligent embalming, id. at 183, 200 So. at 542, we subsequently clarified our position to be consistent with the majority view that the right is limited to "possession of the body ... for the purpose of burial, sepulture or other lawful disposition," and that interference with this right gives rise to a tort

action.[3] Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla.1950). More recently, we affirmed the district court's determination that the next of kin's right in a decedent's remains is based upon "the personal right of the decedent's next of kin to bury the body rather than any property right in the body itself." Jackson v. Rupp, 228 So.2d 916, 918 (Fla. 4th D.C.A. 1969), affirmed, 238 So.2d 86 (Fla.1970). The view that the next of kin has no property right but merely a limited right to possess the body for burial purposes is universally accepted by courts and commentators. See Lawyer

[3]The American Law Institute sets forth the tort of interfering with the "right of burial" as follows: "One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." Restatement (Second) of Torts § 868 (1979).

v. Kernodle, 721 F.2d 632 (8th Cir.1983); Sinai Temple v. Kaplan, 54 Cal.App.3d 1103, 127 Cal.Rptr. 80 (1976); Dougherty v. Mercantile-Safe Deposit & Trust Co., 282 Md. 617, 387 A.2d 244 (Ct.App.1978); Finn v. City of New York, 70 Misc2d 947, 335 N.Y.S.2d 516 (Civ.Ct.1972), rev'd on other grounds, 76 Misc.2d 388, 350 N.Y.S.2d 552 (Sup.Ct.1973); Sullivan v. Catholic Cemeteries, Inc., 113 R.I. 65, 317 A.2d 430 (1974); Sadler & Sadler, Transplantation and the Law: The Need for Organized Sensitivity, 57 Geo.L.J. 5 (1968); Sanders & Dukeminier, Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation, 15 U.C.L.A.L.Rev. 357 (1968). Prosser states:

> A number of decisions have involved the mishandling of dead bodies.... In these cases the courts have talked of a somewhat

> dubious 'property right' to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer.

W. Prosser, The Law of Torts, 43-44 (2d ed. 1955) (footnotes omitted). The Maryland Court of Appeals has summarized the law as follows:

> It is universally recognized that there is no property in a

dead body in a commercial or material sense. '[I]t is not part of the assets of the estate (though its disposition may be affected by the provision of the will); it is not subject to replevin; it is not property in a sense that will support discovery proceedings; it may not be held as security for funeral costs; it cannot be withheld by an express company, or returned to the sender, where shipped under a contract calling for cash on delivery; it may not be the subject of a gift causa mortis; it is not common law larceny to steal a corpse. Rights in a dead body exist ordinarily only for purposes of burial and, except with statutory authorization, for no other purpose.' Snyder v. Holy Cross Hosp., 30 Md.App. 317 at 328 n. 12, 352 A.2d 334 at 340, quoting P.E. Jackson, The Law of Cadavers and of

Burial and Burial Places (2d ed. 1950).

Daugherty, 282 Md. at 620 n. 2, 387 A.2d at 246 n.2.

[2] Under the facts and circumstances of these cases, we find no taking of private property by state action for a non-public purpose in violation of article X, section 6, of the Florida Constitution. We note that the right to bring an action in tort does not necessarily invoke constitutional protections. Decisions of the United States Supreme Court have clearly established that the loss of a common law right by legislative act does not automatically operate as a deprivation of substantive due process. Tort actions may be restricted when necessary to obtain a permissible legislative objective. See Duke Power Co. v. Carolina Environmental

Study Group, Inc., 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978).

[3] Appellees also assert that their right to control the disposition of their decedents' remains is a fundamental right of personal liberty protected against unreasonable governmental intrusion by the due process clause. Appellees argue that, because the statute permits the removal of a decedent's corneas without reference to his family's preferences, it infringes upon a right, characterized as one of religion, family, or privacy, which is fundamental and must be subjected to strict scrutiny. Appellees rely upon a line of decisions from the Unitead States Supreme Court which recognize the freedom of personal choice in matters of family life as one of the liberties protected by

the due process clause. See, e.g., Cleveland Board of Education v. La-Fleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Wisconsin v. Yoder, 406 U.S 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Appellees also point out that the United States Supreme Court has found rights to personal privacy in connection with activities relating to marriage, Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); procreation, Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); contraception, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); abortion, Roe v. Wade; and child-rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

According to appellees, the theme which runs through these cases, and which compels the invalidation of section 732.9185, is the protection from governmental interference of the right of free choice in decisions of fundamental importance to the family.

We reject appellees' argument. The cases cited recognize only freedom of choice concerning personal matters involved in existing, ongoing relationships among living persons as fundamental or essential to the pursuit of happiness by free persons. We find that the right of the next of kin to a tort claim for interference with burial, established by this Court in Dunahoo, does not rise to the constitutional dimension of a fundamental right traditionally protected under either the United States or Florida Constitution.

Neither federal nor state privacy provisions protect an individual from every governmental intrusion into one's private life, see Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla.1983), especially when a statute addresses public health interests. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (state accorded wide latitude in constitutional privacy terms to safeguard health); Roe v. Wade (review less exacting when state asserts effort to safeguard health).

The record contains no evidence that the appellees' objections to the removal of corneal tissues for human transplants are based on any "fundamental tenets of their religious beliefs." Wisconsin v. Yoder, 406 U.S. at 218, 92 S.Ct. at 1534. "[T]he very concept of ordered

liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." Id. at 215-16, 92 S.Ct. at 1533.

[4] We also reject the trial court's finding that section 732.9185 creates an invidious classification regarding the next of kin of deceased persons. "Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others." Parham v. Hughes, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 264 (1979). We find that the statute's effect on the next of kin is incidental and does not offend equal protection.

In view of our finding that the appellees have no protectable liberty or

property interest in the remains of their decedents, we need not address the argument that section 732.9185 violates procedural safeguards guaranteed by the due process clause. See Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

In conclusion, we hold that section 732.9185 is constitutional because it rationally promotes the permissible state objective of restoring sight to the blind.[4] In so holding, we note that laws regarding the removal of human tissues for transplantation implicate moral, ethical, theological, philosophical, and economic

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[4]Courts in Georgia and Michigan have upheld the constitutionality of cornea removal statutes similar to Florida's. See Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60, 335 S.E.2d 127 (1985), cert. denied, ___ U.S. ____, 106 S.Ct. 1464, 89 L.Ed.2d 721 (1986); Tillman v. Detroit Receiving Hospital, 138 Mich.App. 683, 360 N.W.2d 275 (1984).

concerns which do not readily lend themselves to analysis within a traditional legal framework. Applying constitutional standards of review to section 732.9185 obscures the fact that at the heart of the issue lies a policy questioin which calls for a delicate balancing of societal needs and individual concerns more appropriately accomplished by the legislature.

For the reasons expressed, we reverse the trial court's order and remand this cause to the trial court with directions to enter judgment consistent with this opinion.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, EHRLICH and BARKETT, JJ., concur.

SHAW, J., dissents with an opinion.

SHAW, Justice, dissenting.

Before setting out my disagreements

with the substance of the majority opinion, it is necessary to first clarify the procedural posture of these cases.

The Whites brought a complaint in four counts against appellants Gauger, Techman and Shutze concerning the circumstances surrounding an autopsy and cornea removal performed on their teenage son following his accidental drowning on 15 June 1983. Techman and Shutze are medical doctors and, respectively, an assistant medical examiner and the medical examiner in the Fifth Judicial Circuit. Gauger is a non-medical investigator in Marion County. As amended in four counts, the comlaint alleges, inter alia, as follows. Count I alleges that the Whites had objected to the autopsy and any alteration of their son's body; that no cause of death other than accidental

drowning was reasonable in that five persons, including an off-duty highway patrolman, had witnessed the drowning; that appellant Shutze had established a policy and mechanism for performing autopsies on all drowning victims contrary to section 406.11, Florida Statutes (1981); that decisions on autopsies in Marion County are made by Gauger, a private employee of Shutze & Techman P.A., who obtains and transports bodies to Lake County where autopsies are performed; that appellant Shutze permitted Gauger to falsely represent himself as a member of the medical examiner's staff; that Shutze & Techman P.A. performed autopsies on a piecework basis and directly benefited from the number of autopsies performed; that the autopsy was performed contrary to section 872.04, Florida Statutes (1981);

that appellant Gauger was untrained in opthamology and unqualified to be designated under section 732.9185, Florida Statutes (1981), as a person to provide corneas; that conditions precedent to removal of corneas under section 732.9185 were not met; and that the Whites have suffered damages by reason of extreme mental pain and anguish for which compensatory and punitive damages should be paid. Counts II and III are actions pursuant to chapter 86, Florida Statutes (1981), seeking declaratory judgments as to the Whites' rights, duties, and privileges under sections 732.9185 and 406.11 which allege that both sections are unconstitutional both facially and as applied. Count IV is an action alleging violation of civil rights under Title 42, U.S.C. § 1983 and the United States Constitution.

The Powells also brought a complaint in four counts against appellants Shutze and Monroe Regional Medical Center (MRMC) concerning the autopsy and cornea removal performed on their twenty-year-old son following his death in a single vehicle accident on 11 July 1983. Count I alleges that appellants performed an arbitrary, capricious and unlawful autopsy and removed corneas without meeting the conditions precedent of section 732.9185. Count II alleges that section 732.9185 is facially unconstitutional and directly contrary to section 732.910, et seq., Florida Statutes (1981). Counts III and IV allege mental anguish and financial loss caused by, respectively, appellants Shutze and MRMC.

The two cases were consolidated and came before the trial judge on motions for

summary judgment. In the order under appeal, the trial judge found that section 406.11 was constitutional on its face and as applied, but that section 732.9185 was facially unconstitutional. The trial judge did not rule on a motion that section 732.9185 was unconstitutional as applied. The order comes directly to us on the certification of the Fifth District Court of Appeal that it contains a question of great public importance which requires immediate resolution.

The only question legitimately before us is whether the trial court erred in granting a summary judgment that section 732.9185 is facially unconstitutional. In the present posture of the case, we are not presented with the issues of whether sections 406.11 and 732.9185 were complied with in performing these autopsies and

cornea removals, of whether the two sections have been constitutionally applied, of whether section 406.11 is facially constitutional, of whether any or all of the appellants are liable, and of the Whites' rights, duties and privileges under sections 406.11 and 732.9185. Without specifying that it is addressing the narrow issue of the facial constitutionality of section 732.9185, the majority opinion addresses a wide range of issues which are only tenuously related to the narrow issue before us. The majority then reverses and remands with directions that a judgment for appellants (defendants) be entered. In my view this disposition is completely premature. My review of the record indicates there are substantial questions of material fact which preclude entry of summary judgments for the

defendants.

The thrust of the majority opinion appears to be that the state and its agents have an unqualified right to the body of a decedent provided at some point the remains of the remains are turned over to the next of kin. I do not believe this is the law. I am persuaded, as was the trial judge below, that since time immemorial it has been the duty and the right of the next of kin to take control, possession, and custody of the body and remains of a deceased family member. These duties and rights, predicated on religious, moral, and philosophical grounds, were recognized at common law and were not totally surrendered to tne state when our constitutions were adopted. These rights are not only reserved to the people under article I, section 1 of the

Florida Constitution, but are affirmatively protected as religious, liberty, and privacy rights under article I, sections 3, 9, and 23 and by various statutes of the state.

The scope of the common law and the rights retained by the people should not, in my view, be narrowly construed. As the United States Supreme Court has said:

> What is the common law? According to Kent: 'The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.' 1 Kent, Com. 471. As Blackstone says: 'Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the

solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this Kingdom. This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole Kingdom, and form the common law, in its stricter and more usual signification.' 1 Bl.Com. 67. In Black's Law Dictionary, page 232, it is thus defined: 'As distinguished from law created by the enactment of legislature, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial

> antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.'

Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92 101-02, 21 S.Ct. 561, 564, 45 L.Ed. 765 (1901) (emphasis supplied). The right to privacy under section 23 is particularly pertinent in my view because the right to be let alone and to be free from government intrusion into private life is, in large part, simply a constitutional affirmation of common law rights and customs surrounding the exercise of private, as contrasted to public, liberties. The right to possess and control the body of a deceased loved one and to honor and celebrate the decedent's life and death through

appropriate commemoration is a quintessential privacy right.

These personal rights of the next of kin are qualified only by the overriding police power of the state to regulate the care and disposition of dead bodies for the protection of public health and welfare. I have no doubt that the state may require an autopsy when there is a founded suspicion that death was by criminal action, when there is a likelihood that the death was caused by a communicable disease, or, even, when the death is simply inexplicable and the cause needs to be determined. I do not agree that the agents of the state may be constitutionally granted carte blanche to conduct autopsies based on whim, bureaucratic convenience, curiosity, pecuniary gain, or "policy." A significant question of material fact is

whether the agents exceeded their statutory authority and we should have this issue resolved before we address the constitutionality of the statutes. The record consists largely of a series of depositions and affidavits taken or given in connection with the Whites' complaint and with the motions for summary judgments. The Powells' complaint was filed well after the Whites' complaint and contains little of record.

The assistant state attorney assigned to Marion County was deposed and testified as follows regarding the policy performing autopsies. He was of the opinion that autopsies should be conducted on all drowning and vehicle accident victims and had communicated this policy to the medical examiner and law enforcement personnel. Autopsies were necessary even

if there was no suggestion of criminal culpability or doubt about the cause of death. Autopsies were needed in case there were civil suits arising from the death and were important to insurance companies, families, and anyone who might have an interest in the facts. He did not believe the medical examiner had discretion to forego an autopsy when one of the enumerated circumstances of section 406.11 existed, for example, an accidental death. He had conducted an investigation in to the cornea removals from decedent White and found the removals were performed on the authority of the investigator, appellant Gauger. Further, in his opinion, there had been an objection by the White family to the removal of the corneas prior to their removal.

The medical examiner, appellant

Shutze, recited the following in two affidavits. It is the policy of the medical examiner's office to perform full autopsies on all persons who die in Marion County by accident, including, specifically, drowning or motor vehicle accidents. The medical examiner bases this policy on section 406.11 and the request of the state attorney's office. The purposes of autopsies are to (1) determine cause of death, (2) identify health or safety hazards, (3) obtain evidence of criminal conduct, and (4) advance the understanding of medical science. Appellant Gauger is an investigator working for appellant Shutze's professional association; he is not an employee of the medical examiner's office. Appellant Gauger has been instructed to notify the medical examiner's office of all deaths in Marion County. Appellant

Gauger is the medical examiner's authorized designee for Marion County under section 732.9185. The medical examiner or an assistant medical examiner makes the final decision on whether an autopsy should be performed in each specific instance. Appellant Techman performed the autopsy on the Whites' decedent and appellant Shutze performed the autopsy on the Powells' decedent. Objections to autopsies are considered but the final decision is made by the medical examiner or assistant medical examiner. Objections to cornea removals are not solicited but are honored if known. Eye bank personnel, not the medical examiner's office, determine the suitability of corneas for transplant.

The assistant medical examiner, appellant Techman, in an affidavit recited statements on the general policy and

practices of the medical examiner's office which parallel those of appellant Shutze. In addition, appellant Techman recited that he performed the White autopsy and signed the death certificate. He alone made the decision to perform the autopsy, relying on policy, section 406.11, and the request of the state attorney's office. He had no police report available and his only knowledge of the circumstances surrounding the death was based on the investigator's report by appellant Gauger. The report reflected the contact with the family but did not indicate any objection to an autopsy. Had there been any, he would nevertheless have performed the autopsy. He had no knowledge that the corneas were going to be removed, did not authorize their removal, and learned of their removal for the first time when he

began the autopsy.

Appellee White was deposed and testified as follows. He was called to the hospital where his son's body had been taken and met with appellant Gauger. He never met or talked with appellants Shutze and Techman. Appellant Gauger told him that the son's death was a simple accidental drowning with no suggestion of foul play. However, he was told state law required an autopsy be performed and that the body was to be shipped to another county for that autopsy. Appellee White objectead strenuously to the autopsy but believed he had no recourse under the law and asked that the intrusion be kept to a minimum. Appellant Gauger told him it would only be necessary to make a small incision into the chest to probe the lungs. Nothing was said of cornea removal and he only learned

of it when he viewed his son's body at the funeral home following the return of the body after the autopsy. The body's eyes, particularly the right eye, were noticeably sunken into the skull. The funeral director explained this sunken condition of the eyes as caused by the cornea revmoval.

The record also contains minor corrections to a deposition by appellant Gauger. However, the deposition itself is not contained in the record. This deposition could be highly significant in that appellant Gauger appears to be the central figure in these episodes.

Attempting to recount all of the significant questions of material fact which appear on the face of this record would be excessively burdensome and would be of little benefit at this stage of the

proceedings. Moreover, any list would likely be incomplete. It is appropriate, however, to refer to several as illustrative of the issues not yet addressed. The two overarching issues are, first, whether the policies and practices of the medical examiner's office followed in these two cases are consistent with the provisions of sections 406.11 and 732.9185. Second, assuming the statutes were complied with, were they constitutionally applied. Section 925.09, Florida Statutes (1981), authorizes the state attorney to have an autopsy performed when "it is necessary in determining whether or not death was the result of a crime." Two significant questions of material fact engendered by this section are whether these two autopsies, and accompanying cornea removals, were performed under the authority of the

state attorney, and, if so, was that authority legally exercized. Section 406.11(1) authorizes the medical examiner to perform such autopsies as he deems necessary to determine the cause of death. An additional question of material fact is whether the medical examiner's office has a policy or practice of performing autopsies on all accident victims, specifically drowning and vehicle accident victims. In this connection, I note also section 872.01, Florida Statutes (1981), titled Dealing in dead bodies; section 872.04, Florida Statutes (1981), titled Autoposies; consent required, exception; and chapter 936, Florida Statutes (1981), titled Inquests of the Dead. Significant questions of material fact also arise in connection with section 732.9185. Two general questions, with numerous subsidiary

questions, are whether the conditions precedent to cornea removal were present and whether the provisions of section 732.9185 were followed. The issue of the constitutionality of sections 406.11 and 732.9185, as applied, is inchoate at this stage of the proceeding.

The legislature is apparently of the view, contrary to the majority, that a decedent's next of kin have the right to possess and control the decedent's body and that both the decedent and next of kin may control the removal and donation of human organs. The various provisions of chapter 245, Florida Statutes (1981), titled Disposition of Dead Bodies, are grounded on the right of the next of kin to claim control and possession of dead bodies. Section 245.07 appears to rule out the state's use of dead bodies

for the advancement of medical science unless the bodies are unclaimed or donated under section 245.11.[1] On the question of the donation and removal of organs, chapter 732, part X, Florida Statutes (1985), authorizes and establishes programs whereby both the decedent and survivors may donate organs of a decedent. Section 732.912 is particularly pertinent. Subsection (1) authorizes the donation of organs by will; subsection (2) authorizes the donation of a decedent's organs by next of kin in a priority order and also recognizes the right of next of kin to veto the removal or donation of organs.

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[1]This does not mean that medical science may not be advanced as a by-product of autopsies which are legally conducted for other reasons under § 406.11. It does suggest, however, that advancement of medical science, without more, is not legal justification for conducting an autopsy on bodies which come into the hands of the medical examiner.

Moreover, section 732.9185(1)(b) itself recognizes the right of the next of kin to veto the donation of the cornea.[2] The crucial point is that part X of chapter 732 is grounded on the right of the decedent and next of kin to control the removal and disposition of organs taken from the body of the decedent. If this is not so, part X is grounded on air. It is a conundrum in that it is simply not legally possible nor permissible to donate or control the donation of an article

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[2]Section 732.9185(1)(b) states: "[n]o objection by the next of kin of the decedent is known by the medical examiner." Subsection (2) provides that the medical examiner will not be held liable for "failure to obtain consent of the next of kin." The words "failure to obtain" suggest an unsuccessful effort. These provisions are apparently being interpreted as authority not to seek consent from next of kin who are physically present and readily available to grant or deny consent. Is that the legislative intent? The trial court should hear arguments and address this point.

which does not belong to the donor.

I agree that these cases present issues of great public importance which may, at some point, require this Court's attention. At this point, however, there is substantial doubt that sections 406.11 and 732.9185 have been correctly interpreted and applied by the cognizant authorities in Marion County. The issues presented by these suits, particularly the counts requesting a declaratory judgment of the rights, duties, and privileges of the next of kin, are likely to be with us a long time and to become even more intense as medical science advances and organ transplants increase in number. I am simply not prepared to rush to judgment on issues as important as these based on a summary judgment. These issues are important, but we are not a legislative

body rushing to enact emergency legislation to meet an urgent state need before the end of a legislative session. These cases should be remanded with instructions that the trial go forward and a record be developed.

86 1586

Supreme Court, U.S.
FILED
APR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

WADE POWELL and FREDA POWELL, his wife, and ERWIN WHITE and SUSAN WHITE, his wife,

Petitioners,

vs.

STATE OF FLORIDA, MUNROE REGIONAL CENTER, WILLIAM H. SHULTE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, M.D., NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY and the FLORIDA MEDICAL ASSOCIATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

Does the constitutionality of the State of Florida's Restoration of Sight Act which indisputedly serves the legitimate public purpose of restoring vision to Florida's sightless citizens merit review in the absence of any showing of infringement on fundamental federal rights?

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STATEMENT OF THE CASE

The Material Facts

There are a number of significant undisputed, material facts that have been omitted from the Petitioners' statement. The State of Florida therefore directs the Court's attention to the following facts of record, most of which are recited in the opinion of the Florida Supreme Court. See, State of Florida, et al., v. Wade Powell, et al., 497 So.2d 1188 (Fla. 1986); Pet. App. 13-18.

1. The State of Florida spends approximately $138,000,000 each year to provide its blind citizens with the basic necessities of life. At present, approximately ten percent of Florida's blind citizens are candidates for a cornea transplant, the highly effective procedure for restoring sight to the functionally blind (Pet. App. 13).

2. Cornea transplants are expected to increase in the State of Florida due to the increasing number of elderly persons locating in Florida, as corneal blindness is often age related. (Pet. App. 14).

3. Advances in the field of cornea transplants have expanded the use of this procedure to newborns, who without the Restoration of Sight Act would remain blind forever. If a newborn's corneas are not clear and a transplant is required, it must occur in the first few months of life. Otherwise, the brain loses its ability to "learn to see." (Pet. App. 14).

4. The key to successful corneal transplants is the availability of high quality corneal tissue; corneal tissue removed more than ten hours after death is generally unsuitable for transplantation. (Pet. App. 15).

5. The enactment of the Restoration of Sight Act, Section 732.9185, Florida Statutes, in 1977 has indisputably resulted in the increase of both the supply and quality of transplantable cornea tissue. In 1976, only 500 corneas were obtained for transplantation in the State of Florida, in stark contrast to the more than 3,000 Florida citizens who in 1985 had their sight restored through corneal transplant surgery. (Pet. App. 15).

6. The quality of corneal tissue obtained by outright donation and the tissue obtained pursuant to Florida's Restoration of Sight Act differs markedly. The tissue donated by individuals is largely unusable because of the advanced age of the donor at death. However, approximately eighty to eighty-five percent of the tissue obtained through medical examiners is suitable for transplantation. (Pet. App. 15, 16).

7. The reason for this increase in the quantity and quality of available corneal tissue was brought about by passage of Florida's Restoration of Sight Act. This is, in large part, attributable to the fact that Section 732.9185, Florida Statutes, does not impose a duty upon medical examiners to seek out the next of kin to obtain consent for the corneal removal. An affidavit in the record establishes that when California had a law imposing a consent requirement, the majority of families asked responded positively; however, approximately eighty percent of the families could not be located in sufficient time to remove usable corneal tissue. (Pet. App. 16).

8. Florida law permits removal of corneal tissue only when an autopsy is legally required. An autopsy necessarily results in a massive intrusion into the

decedent. Cornea removal, by comparison, requires an infinitesimally small -- only about .5 mm in thickness -- intrusion. The result does not affect the decedent's appearance. With or without cornea removal, the eyes must be "capped" to maintain a normal appearance. (Pet. App. 17).

9. Under Florida law, medical examiners may not automatically remove corneal tissue from all decedents subject to autopsy. The Restoration of Sight Act requires a request be made by an eye bank based on a present need for the corneal tissue. (Pet. App. 18).

SUMMARY OF ARGUMENT

Under Rule 17, Supreme Court Rules, the only arguable basis for the Court considering this case would be if it presented an important question of federal law which the Court had not settled. However,

Petitioners' present no important question of federal or constitutional law; the "right" they seek to assert is not fundamental. Despite Petitioners' arguments about the intimacy of family bonds and historical and traditional societal interests in "rituals and practices, religious and otherwise," the removal of corneal tissue, pursuant to the Act, violates no right or interest ever recognized under common law, much less a fundamental constitutional right.

Petitioners impart a false significance to their claim by referring to what they contend will be an increasing demand for "body parts from the dead" as medical technology advances. The statute at issue does not authorize removal for transplantation of anything other than corneal tissue. That, as the Florida Supreme Court observed, involves a minimal, even

negligible, intrusion into the body, occurring only when there is the already required massive intrusion of an autopsy.

The Florida Supreme Court correctly decided that no fundamental right or interest is violated by the Restoration of Sight Act and that Petitioners were not entitled to notice in the absence of any such recognized right or interest.

ARGUMENT

Respondent, State of Florida, (hereinafter Respondent, Florida) contends that under contemporary Florida law, Petitioners have no cognizable property interest in the remains of their decedents such as would entitle them to constitutional protection. Property interests are not created by the Constitution, but rather are "created and their dimensions are defined by existing rules or understandings that

stem from an independent source such as state law...." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Respondent Florida recognizes and concedes that Petitioners have a "right" under Florida law to dispose of their decedent as they deem appropriate. However, this "right" is limited to "possession of the body for the purpose of burial, sepulture or other lawful disposition...." Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla. 1950). The Fourth District Court of Appeal of Florida recognized the survivor's "right" in the remains of his decedent as based upon "the personal right of the decedent's next-of-kin to bury the body rather than any property right in the body itself." Jackson v. Rupp, 228 So.2d 916, 918 (Fla. 4th DCA 1969), aff'd, 238 So.2d 86, 89 (Fla. 1970) (emphasis added). Florida law, therefore, recognizes that survivors have a

"right" to lawfully dispose of their decedent, but this right is in the nature of tort rather than a property interest protected under the Constitution.

It is fundamental that in order to be entitled to constitutional protection, a person must demonstrate a legally cognizable interest in the matter to be protected. Under Florida law, Petitioners' right to dispose of their decedents as they deem appropriate, is simply not of a constitutional magnitude.

Equally clear is that a decedent has no constitutional interest in his own remains. Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), cert. denied, 454 U.S. 833 (1983); Roe v. Wade, 410 U.S. 113 (1973); Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979).

Based on the foregoing, Respondent, Florida, submits that Petitioners have no

cognizable property interest in the remains of their decedents, either individually or as representatives of the decedents' estates, such as would entitle them to constitutional protection.

The legitimate governmental and public interests served by the Restoration of Sight Act are among the most compelling imaginable, and the means which the Legislature of Florida has chosen to accomplish this goal are among the most effective and least intrusive. Corneal tissue obtained through the operation of the Restoration of Sight Act accounts for approximately 90% of the tissue used for corneal transplants in Florida (R.572). This result is due in great part to the fact that affirmative consent by the next-of-kin is not required, and hence, much otherwise usable tissue is not lost through delay and/or the inability to contact next-of-kin. (Pet. App. 16).

The major critical factor in corneal transplants is the passage of time. (Pet. App. 14, 15).

The transplant of corneas differs in several important respects from the transplant of vital organs. Cornea transplants are simpler than transplants of vital organs. No matching of tissue is required, as with vital organs. In fact, almost every decedent is a potential suitable donor. Removal of corneal tissue does not affect a decedent's appearance as natural changes which occur after death require placement of eye-caps over the surface of each eye, regardless of whether corneal tissue has been removed.

The Restoration of Sight Act actually achieves its intended purpose of reducing blindness and its socio-economic impact on citizens of the State of Florida. More high quality corneal tissue is available

for use, decreasing patient waiting time for, and increasing the success rate of, corneal transplant surgery. Since it is only for the blind and vision-impaired that cornea transplants are needed, the Act's effect on correcting blindness, by increasing the supply of usable corneal tissue for transplant is unmistakable.

Petitioners have demanded to be compensated for the value of the corneal tissue removed (Pet. Brief 9). There is no fair market value for corneal tissue, however, because Section 873.01, Florida Statutes, prohibits the sale of anatomical matter. Moreover, even if it did not, there does not seem to be any reasonable basis for calculating the fair market value of corneal tissue. To the blind recipient, it is no doubt invaluable. At the same time, the eye banks, as not-for-profit distributors, charge less than their operating

expenses and in some circumstances provide the corneal tissue totally free of charge. (R.571-574).

Florida's Restoration of Sight Act contains many safeguards designed to limit cornea removal to instances in which the public's interest is greatest and the impact on the next-of-kin least. Corneas may only be removed (1) if the deceased is under the jurisdiction of the medical examiner, and (2) an autopsy is mandated by Florida law, and (3) removal will not interfere with the autopsy or an investigation of the death, and (4) a request must be made by an eye bank based on a present need, and (5) if no objection to the removal is known to the medical examiner. (Pet. App. 17,18). An autopsy is a surgical dissection of the body: it necessarily results in a massive intrusion into the decedent. However, autopsy

statutes, many of which authorize the procedure even in the face of known objections by the next-of-kin, have been upheld again and again as, in fact, the Florida autopsy statute was so upheld in the instant case. (Pet. App. 75). By comparison, cornea removal requires an infinitesimally small intrusion which does not visably affect the decedent's appearance. (Pet. App. 17).

Unquestionably, under the autopsy statute, the medical examiner has broad discretionary authority to order an autopsy. Beyond the natural changes that death brings to the condition of the body, the autopsy procedure alters it substantially more. It is only under these same circumstances, of massive intrusion, that the Legislature has by the Restoration of Sight Act authorized the slight further change of removing, absent objection,

small, thin, clear corneal tissue for transplant. Through this procedure the Legislature has sought and achieved the worthy public goal of bestowing sight to its blind citizens, unquestionably furthering the public health and welfare.

The procedure established by the Restoration of Sight Act is a legislative choice, rationally related to achieving legitimate public purposes. Petitioners' views in opposition to the statute, rooted in their philosophical sentiments[1] are improperly voiced in court: they must be addressed to the elected representatives of society who passed the Act, and who enact

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[1]The Florida Supreme Court's decision notes that "the record contains no evidence that the appellees' ["Petitioners"] objections to the removal of corneal tissue for human transplants are based on any 'fundamental tenets of their religious beliefs.'" (Pet. App. 27).

laws both to benefit society and to reflect its prevailing views and wishes.

CONCLUSION

The record below establishes that the "rights" upon which Petitioners rely to invalidate Florida's Restoration of Sight Act are not rights of a constitutional magnitude.

To the extent that Petitioners possess a right of less than constitutional magnitude to possession of a deceased's body for lawful burial, the minimal intrusion authorized by the Restoration of Sight Act is far outweighed by the state interest in public health and welfare in restoring vision to Florida's sightless citizens which the Act is intended to, and does, promote. Therefore, Respondent, Florida, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

WADE POWELL and FREDA POWELL, and ERWIN WHITE and SUSAN WHITE,
Petitioners,

versus

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND FLORIDA MEDICAL ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, ON BEHALF OF RABBINICAL ASSOCIATION OF GREATER MIAMI, TEMPLE BETH OR, AND RABBI RAMI SHAPIRO, Ph.D.,

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The Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, Ph.D., through counsel, move this court for leave to participate as Amicus Curiae in support of the grant of a writ of certiorari and to file an amicus curiae brief. This motion proceeds in accordance with Supreme Court Rule 36. Although several Respondents have consented to the participation of Amicus Curiae, not all Respondents have given their consent, thus necessitating this motion. In support of the motion for leave to file an amicus curiae brief, the Amici state:

1. Amicus Curiae, The Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, Ph.D., filed an amicus curiae brief in proceedings before the Supreme Court of Florida. In that tribunal, the amici

requested that the Supreme Court consider the impact of the Florida statute under review on the fundamental religious beliefs held by the Jewish people. This court should consider those same interests in determining whether this case warrants certiorari review.

2. The Rabbinical Associaton of Greater Miami is an organized confederation of more than 100 rabbis throughout South Florida representing Orthodox, Conservative, Reform, and Reconstructionist congregations. Virtually every Jewish congregation and synagogue within the South Florida geographic area is represented within the Association, which in turn is representative of the considerable Jewish population throughout the United States. As a leadership group for the Jewish people, the Association takes stands on specific Jewish

issues. Through its membership, the Association provides spiritual and temporal guidance for the rabbis in the South Florida area and to the approximately 400,000 members of the Jewish population.

3. Temple Beth Or is a Reconstructionist synagogue in South Florida, founded in April 1983. Its membership includes more than 100 Jewish families. At the heart of the Reconstructionist philosophy of Temple Beth Or is the conviction that Judaism represents the accumulated wisdom of the Jewish people and is renewed through each successive generation. Temple Beth Or, through its members, expresses and encourages involvement with the difficult Jewish issues of today in an effort to promote the integration of Jewishness into the lives of Jews. Its members recognize the need for observance of Judaic law.

4. Rabbi Rami Shapiro, Ph.D., is the rabbi at Temple Beth Or. As a religious leader, he speaks out on issues concerning the survival of the Jewish people and its culture. He has a strong interest in Jewish religious law, customs, and traditions involving matters of life and death. He is a frequent lecturer and author on Jewish religious and cultural issues.

5. These Amici strongly maintain that question concerning removal of organs from a decedent must be examined in light of Jewish law as well as by taking into consideration modern societal principles. It is their view that any law which permits the taking of organs must respect existing religious principles. It is their intention to advise this court of Jewish law concerning the matters raised in this case.

For the foregoing reasons, the Rabbinical Association of Greater Miami, Temple Beth Or and Rabbi Rami Shapiro, Ph.D., respectfully move this court for leave to participate as amicus curiae and file the accompanying brief.

Respectfully submitted,

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By_____
BENEDICT P. KUEHNE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 1st day of ~~April~~ May 1987, to Stephen T. Maher, Esq., American Civil Liberties Union Foundation of Florida, Inc., University of Miami

School of Law, P.O. Box 248087, Coral Gables, Florida 33124; Robert A. Butterworth, Attorney General of the State of Florida, and Louis F. Hubener, Assistant Attorney General, Counsel for State of Florida, Department of Legal Affairs, The Capitol - Suite 1502, Tallahassee, Florida 32301; Alan C. Sundberg, Esq. and George N. Meros, Esq., Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.O. Drawer 190, 410 First Florida Bank, Tallahassee, Florida 32302, Counsel for Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc. and Florida Lions Eye Bank, Inc.; Andrew G. Pattillo, Jr., Esq. and Russell W. Lapeer, Esq., P.O. Box 1450, Ocala, Florida 32678, Counsel for William H. Shutze, M.D., Thomas M. Techman, M.D., and Keith Gauger; Bruce McKibben, Esq., Dempsey & Goldsmith, P.O. Box 10651, Tallahassee, Florida 32302, Counsel for

Florida Society of Opthalmology; Donald W. Weidner, Esq., Associate General Counsel, 760 Riverside Avenue, Jacksonville, Florida 32204, Counsel for Florida Medical Association; Robert A. Ginsberg, Dade County Attorney, Robert L. Blake, Assistant County Attorney, Public Health Trust Division, Jackson Memorial Hospital, Suite C - West Wing 108, Miami, Florida 33136, Counsel for Metropolitan Dade County, Florida; Frederick H. Von Unwerth, Esq., Kilpatrick & Cody, Suite 500, 2501 M. Street, N.W. Washington, D.C. 20037, Counsel for the Eye Bank Association of America, Inc.; and Melinda L. McNichols, Esq., Stearns, Weaver, Miller, et al., One Biscayne Tower, 28th Floor, Miami, Florida 33131, counsel for Reverend Thomas J. Price.

By_____
BENEDICT P. KUEHNE

(6)

No. 86-1536

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

WADE POWELL AND FREDA POWELL, HIS WIFE, AND ERWIN WHITE AND SUSAN WHITE, HIS WIFE,

Petitioners,

v.

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, M.D., NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OBJECTION BY RESPONDENTS WILLIAM H. SHUTZE, M.D., THOMAS M. TECHMAN, M.D., AND KEITH GAUGER, IN RESPONSE TO MOTION TO PARTICIPATE AS AMICUS CURIAE

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REASONS FOR OBJECTION BY RESPONDENTS' WILLIAM H. SHUTZE, M.D., THOMAS M. TECHMAN, M.D., AND KEITH GAUGER, IN RESPONSE TO MOTION TO PARTICIPATE AS AMICUS CURIAE

Pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States, Respondents William H. Shutze, M.D., Thomas M. Techman, M.D., and Keith Gauger, by their attorneys, object to the motion of the Rabbinical Association of Greater Miami, of Temple Beth Or, and of Rabbi Rami Shapiro, for participation as amici curiae in support of the grant of a writ of certiorari on behalf of Petitioners. Respondents object to the participation of these proposed amici curiae on the following grounds:

1. While amici curiae often can provide helpful information and insight on issues presented and pending on a case, that is not the role that proposed amici seek in this case.

2. Proposed amici candidly seek leave to participate on behalf, and in support, of Petitioners.

3. Proposed amici avowedly assert that legislation authorizing the removal of corneal tissue, such as the Florida cornea removal statute, *Fla. Stat.* § 732.9185, "must respect existing religious principles," and that they intend to advise the "[C]ourt of Jewish law concerning the matters raised in this case" (Motion for Participation at 3.)

4. In their brief in support of the grant of a writ of certiorari, proposed amici explicitly argue that "the statute permits and authorizes state action which violates individual religious interests and inhibits the free exercise

of religion" (Brief at 11); and they discuss at length Judiac law, and orthodox Jewish thought and religious tenets.

5. Nowhere in the record of this case are there pleadings, much less evidence, of any persons aggrieved by, and raising objections to, the cornea removal statute on grounds that it interferes with, or infringes upon, precepts of their religious faith.

6. The Florida Supreme Court rejected an attempt to introduce issues based on the Free Exercise Clause for this very reason:

> The record contains no evidence that the Appellees' [Petitioners'] objections to the removal of corneal tissues for human transplants are based on any 'fundamental tenets of their religious beliefs.' *Wisconsin v. Yoder,* 406 U.S. [205] at 218, 92 S.Ct. [1526] at 1534 [(1972)]. '[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.' *Id.* at 215-16, 92 S.Ct. at 1533.

Florida v. Powell, 497 So.2d 1188, 1193 (Fla. 1986).

7. Proposed amici lack the requisite standing to introduce this Free Exercise claim into this case because the interests which they assert are hypothetical to the parties and to the record before the Court in this case. "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson,* 346 U.S. 249, 255, 73 S.Ct. 1031, 1034 (1953).

> Federal courts must hesitate before resolving a controversy, even one within their constitutional power

> to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.

Singleton v. Wulff, 428 U.S. 106, 113-14, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976). These "[a]dditional prodential limitations on standing," *Phillips Petroleum Co. v. Shutts*, — U.S. —, 105 S.Ct. 2965, 2971, 86 L.Ed.2d 593 (1985), apply with even more force to amici curiae whose legal position would inject issues unsupported by any evidence, and unrepresented by any parties, in the case.

8. There is no relationship between Petitioners and proposed amici that would warrant their raising a constitutional Free Exercise issue, otherwise unsupported by the record in this case. Neither is there any suggestion that third persons—not parties to this case—who might possess a genuine basis in religious belief to object to the statute in question, would encounter obstacles or impediments making it difficult for them to do so. Hence, the "two factual elements," to which "the Court has looked primarily . . . to determine whether the [general] rule [against standing to assert the constitutional rights of nonlitigants] should apply," militate against any excep-

tion that would allow proposed amici to present their Free Exercise claim. *Singleton v. Wulff*, 428 U.S. at 114-16, 96 S.Ct. at 2874-75.

9. Accordingly, the participation of proposed amici in this case is inappropriate in the light of (a) Petitioners' claims; (b) the evidentiary record; and (c) the position that amici would introduce, in this case.

The Motion for Participation of the Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, as Amicus Curiae in Support of the Grant of a Writ of Certiorari, should be denied.

Respectfully submitted,

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Attorneys for Respondents,
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Thomas M. Techman, M.D.,
and Keith Gauger

NO. 86-1536

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

WADE POWELL and FREDA POWELL, his wife, and ERWIN WHITE and SUSAN WHITE, his wife,

Petitioners,

versus

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, RABBINICAL ASSOCIATION OF GREATER MIAMI, TEMPLE BETH OR, AND RABBI RAMI SHAPIRO, Ph.D., IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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24pp

QUESTION PRESENTED FOR REVIEW

DOES A STATE'S REMOVAL OF THE CORNEAS OF A DECEDENT WITHOUT THE CONSENT OF THE NEXT OF KIN VIOLATE THE FAMILY'S FUNDAMENTAL RIGHTS OF PRIVACY OR PERSONAL LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE?

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NO.

IN THE
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October Term 1986

WADE POWELL and FREDA POWELL,
his wife, et al.,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE, RABBINICAL ASSOCIATION OF GREATER MIAMI, TEMPLE BETH OR, AND RABBI RAMI SHAPIRO, Ph.D., IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

INTEREST OF AMICUS[1]/

The Rabbinical Association of Greater Miami is an organized confedera-

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1/ Letters consenting to the filing of this brief are being forwarded to the Clerk of Court.

tion of more than 100 rabbis throughout South Florida representing Orthodox, Conservative, Reform, and Reconstructionist congregations. Virtually every Jewish congregation and synagogue within the South Florida geographic area is represented within the Association, which in turn is representative of the considerable Jewish population throughout the United States. As a leadership group for the Jewish people, the Association takes stands on specific Jewish issues. Through its membership, the Association provides spiritual and temporal guidance for the rabbis in the South Florida area and to the approximately 400,000 members of the Jewish population.

Temple Beth Or is a Reconstructionist synagogue in South Florida, founded in April 1983. Its membership includes more than 100 Jewish families. At the

heart of the Reconstructionist philosophy of Temple Beth Or is the conviction that Judaism represents the accumulated wisdom of the Jewish people and is renewed through each successive generation. Temple Beth Or, through its members, expresses and encourages involvement with the difficult Jewish issues of today in an effort to promote the integration of Jewishness into the lives of Jews. Its members recognize the need for observance of Judaic law.

Rabbi Rami Shapiro, Ph.D., is the rabbi at Temple Beth Or. As a religious leader, he speaks out on issues concerning the survival of the Jewish people and its culture. He has a strong interest in Jewish religious law, customs, and traditions involving matters of life and death. He is a frequent lecturer and author on Jewish religious and cultural issues.

These Amici strongly maintain that questions concerning removal of organs from a decedent must be examined in light of Jewish law as well as by taking into consideration modern societal principles. It is their view that any law which permits the taking of organs must respect existing religious principles. It is their intention to advise this court of Jewish law concerning the matters raised in this case. Amici have a direct interest in the resolution of this question since the ability of the Jewish people to practice their religion will be jeopardized by the decision of the Supreme Court of Florida.

Amicus Curiae were represented in proceedings before the Florida Supreme Court, having filed an amicus brief in that tribunal, and seek to assist this court in resolving this very important case.

SUMMARY OF THE ARGUMENT

The donation of body parts for the advancement of medical science or the preservation of human life is a matter which must be committed to the personal decision of the individual or the family. When tissue and organ donation is placed in the context of Jewish life, it also becomes a matter of religious law. Although it remains a personal matter, the decision to donate body parts is affected by the Jewish belief that both the body and the soul are sacred because both are the handiwork of God and are entitled to reverence. Kohn v. United States, 591 F.2d 568, 572-573 (E.D.N.Y. 1984), aff'd, 760 F.2d 253 (2d Cir. 1985).

The Florida Cornea Removal Statute has as its purpose the commendable objective of providing quality cornea tissue to people in need. The statute

promotes the restoration of sight to countless people, thus improving the quality of life for those individuals and, by extension, for all society. Notwithstanding this laudatory purpose, the statute permits medical examiners to remove cornea tissue without first obtaining permission from the person, while living, or from the decedent's next of kin. To the extent that the statute authorizes the taking without reasonable notice and an opportunity for consent, the statute conflicts with fundamental constitutional freedoms. Since the statute on its face permits the taking of cornea tissue from the body of an observant, but now deceased, Jew absent individual or familial consent, the Cornea Removal Statute infringes upon the free exercise of religion and effectively promotes interests which are inimical to those of

Judaism, without any countervailing government need. The statute has the inevitable effect of making second class citizens of Jews and members of all other religions which disfavor anatomical donation without consent.

The statute further elevates the needs of authorized eye banks above the interests of the individual and the family, which unconstitutionally infringes on the right of the family to direct disposition of the remains of its members. Absent a compelling state interest and given the availability of less intrusive alternatives, the taking of corneas without personal or family consent cannot be condoned. To the extent that the statute permits this illegitimate conduct, it must be ruled unconstitutional.

REASONS FOR GRANTING THE WRIT

THE FLORIDA CORNEA REMOVAL STATUTE UNCONSTITUTIONALLY INFRINGES ON FUNDAMENTAL PERSONAL AND RELIGIOUS FREEDOMS BY PERMITTING THE REMOVAL OF BODY PARTS WITHOUT CONSIDERATION OF INDIVIDUAL OR FAMILY CONSENT.

The Cornea Removal Statute,[2/] a

[2/] The Cornea Removal Statute, §732.9185, Fla.Stat. (1983), provides:

> (1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under §732.918, provide the cornea of a decedent whenever all of the following conditions are met:
>
> (a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance with §406.11.
>
> (b) No objection by the next of kin of the decedent is known by the medical examiner.
>
> (c) The removal of the cornea will not interfere with the subsequent course of an investiga-

(fn.Cont.)

portion of the Florida Anatomical Gift Act,[3] permits the medical examiner to provide a cornea upon request of an authorized eye bank whenever the decedent is under the jurisdiction of the medical examiner, there is no objection by the next of kin known by the

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tion or autopsy.

(2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under §732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

[3] The Florida Anatomical Gift Act, §§732.910-732.921, Fla. Stat. (Supp. 1984), is an adaptation of the Uniform Anatomical Gift Act. The purpose of the Act, as found within the legislative declaration, is to encourage the pre- and post-mortem **donation** of tissue and organs as gifts for medicine and research. §732.910, Fla.Stat. (Supp. 1984). Florida law defines a gift as the voluntary transfer of property by one to another without any consideration or compensation. 28 Fla.Jur.2d Gifts §1. The taking of bodily tissue or organs by means other than the voluntary act of the person or the decedent's family cannot be considered a gift.

medical examiner, and the removal of the cornea will not interfere with the subsequent course of an investigation or autopsy. 1977 Op. Att'y Gen. Fla. 077-14 (Nov. 2, 1977). The inclusion of a "no known objection" standard as a basis for permitting the removal of a cornea is singularly unique to the Cornea Removal Statute and is not found within any other part of the Anatomical Gift Act. Compare §732.912, Fla.Stat. (Supp. 1984)(provides for the **donation** of body parts for purposes consistent with the legislative intent to benefit medical science or human life).

The Cornea Removal Statute impermissibly conflicts with valid constitutional interests by permitting the removal of corneas without obtaining the inter vivos consent of the person whose cornea will be removed or the consent of the family of a deceased person whose

cornea will be taken. The statute disregards any valid religious and family concerns with the sanctity of the human body and the reverence due the body at the time of death. The statute conflicts with the guarantees of the First and Fourteenth Amendments to the United States Constitution. Because the statute permits and authorizes state action which violates individual religious interests and inhibits the free exercise of religion, this Court must grant certiorari review in order to assess the constitutionality of this law, which is not unique to Florida but encompassed within the laws of at least eleven states.

To Jews, the subject of the dead and their treatment is one of historical importance and concern.[4/] A central

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4/ See I. Jakobovits, Jewish Medical Ethics Ch. 12 (1959) (hereinafter (fn.Cont.)

component of Jewish law is that an aura of reverence for both the body and its spiritual counterpart must exist in both life and death.5/ The same reverence for life is equally a part of matters involving the dead.6/

Jewish law rigorously upholds the inviolability of the human body in death as well as life.7/ This includes a general disfavor of anatomical dissec-

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Jakobovits).

5/ Judaism believes in the principle that body and soul are sacred because both are the handiwork of God and are entitled to reverence. I. Klein, A Guide to Jewish Religious Practice 270 (1979).

6/ S. Krauss, 2 Talmudische Archaeologie 55 and 473 n. 411 (Leipzig 1910-1912).

7/ Jakobovits at 135. This accounts for the Jewish opposition to cremation. I. M. Rabinowitch, Post-Mortem Examinations and the Jewish Law 19 (Montreal 1945). Jewish law proscribes autopsies except in cases of need, when the autopsy must be conducted with a sense of reverence for the body and is limited to those portions of the body needed for examination. Jakobovits at 278-283.

tion and a complementary teaching that the whole body must be buried upon death. If body parts have been removed, they must be returned and buried with the rest of the body.[8] Under Jewish law, man does not control the rights to the body,[9] for human life and its bodily vessel are "the possession of the Holy One...."[10]

The use of corneal grafts to restore sight to the blind can be considered a life-saving act, if prior consent of the donor or the family has been obtained.[11] This narrow exception to the rigidly defined Judaic law that the entire body must be buried is in

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8/ Rosner, Autopsy in Jewish Law and the Israeli Autopsy Controversy, Jewish Bioethics 331, 332 (1979).

9/ Jakobovits at 98.

10/ S. J. Lewin, Le'or Hahalakhah 188 (1946).

11/ Jakobovits at 286 n.126.

keeping with a central component of Jewish thought: life itself is sacred and Jews should assist in the saving of lives. Even when permission is granted for a cornea transplant for the purpose of restoring sight to a blind person, Jewish law requires that the disused portion of the eye after the cornea has been removed cannot be disposed of except by burial.12/ Absent these considerations, there can be no compliance with the Judaic mandate that the body be treated with reverence.

Thus, for the Jew observant of orthodox thought and religious tenets, matters involving anatomical separation call into question serious religious principles. In light of these strong religious concerns, it is not surprising that Jewish law mandates that the

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12/ Id.

separation of tissue and organs from the body occur only in cases of medical need with the person's free will and consent in writing.[13] A decision to take organs or tissue without individual permission shows a demonstrated lack of reverence for the body. It violates, moreover, the religious beliefs of a considerable segment of the population.

Considerations of expediency must not be permitted to overshadow religious interests. Unfortunately, the decision of the Florida Supreme Court elevated private interests, as bootstrapped by governmental concerns, above those of the individual without any finding of need, particularly where an affirmative answer to the consent question was readily available. State v. Powell, 497 So.2d 1188 (Fla. 1986).

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[13] Jakobovits at 150. See also H. Adler, Anglo-Jewish Memories 137 (1909).

A serious danger to religious freedom exists in any situation where the state, by action of its positive law, can separate the body from its tissues and organs without consent, as this statute permits, and absent any requirement to attempt to obtain consent. Even at the point of death, a human body does not belong to the state, but is a responsibility of the next of kin.14/ This was the holding of Kohn v. United States, 591 F.Supp. at 573: "The law in the United States appears to be established that the next of kin have the right to possession of the dead body and that they may have damages for the injury to their feelings from any wrongful handling of the corpse." Even where

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14/ The language of the Anatomical Gift Act supports this position by recognizing the family interest in the decedent's body and encouraging familial support of tissue and organ donations.

the family yields permission to others to deal with the body, the law must impose on the state the obligation to treat the corpse with respect. This obligation, evolving out of religious concern for the body, protects the vital interests guaranteed by the First Amendment. Kohn v. United States, 591 F.Supp. at 573.

The Cornea Removal Statute conflicts with the teachings of Judaism, and other religions. The statute disregards the religious beliefs discussed above, and can hinder observers from practicing their faith. Manifestly, unlike any other portion of the Anatomical Gift Act, the statute promotes the studied ignorance by the medical examiner in matters involving family approval for the taking of corneas. This is a particularly sinister government attitude, especially when it

involves dealings with known Jewish cadavers. Recognizing the orthodox Jewish position that the entire body should be buried, would a medical examiner have any reason to seek family permission for the "donation" of a cornea in the case of a Jewish body? A negative answer from the family would deprive the medical examiner of the needed cornea, while the absence of any inquiry gives the medical examiner immunity for defiling the body in violation of religious tenets.

Organized Judaism is neither unconcerned with nor insensitive to the needs of the living and society for transplant tissue and organs, body parts which further medical research and ultimately advance life. Indeed, Jewish history reflects examples of individuals who have donated their own bodies for the advancement of human life or medical

science.[15] The unselfish act of giving of one's self to help others is worthy of praise. The crucial factor, from a Jewish law perspective, is that the person -- individually or through the family -- must make the intensely personal decision for anatomical dissection and donation. The statute as it exists does not accommodate this religious requirement, and instead permits forced "donation" without consideration of religious scruples. This conflict between government interests and individual rights is the type of controversy which must be resolved by this Court.

There can be little if any valid reason for the state to act in a manner which prevents a person's proper burial and eternal rest for the soul according

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[15] See Jakobovits at 147.

to that person's religious tenets. There is even less reason for the state to deprive the individual of the right to direct compliance with religious law. Organized Judaism recognizes the right of the state to perform autopsies under the limited circumstances directed by §406.11, Florida Statutes, even though the autopsy may conflict with religious preferences. But there is no right for the state to take apart one's body, remove tissue for purposes not associated with that body, and deny an opportunity for the person or the family to object on religious grounds. The statute under consideration is far too broad in promoting the desired ends. The conflict between the need for quality cornea tissue and religious beliefs must be resolved on the side of religious and individual freedom. Until the statute incorporates that right, it cannot be constitutionally validated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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By_____
BENEDICT P. KUEHNE

Supreme Court, U.S.
FILED
APR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1536

In The

Supreme Court of the United States

October Term, 1986

WADE POWELL and FREDA POWELL, his wife, and ERWIN WHITE and SUSAN WHITE, his wife,

Petitioners,

versus

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONSE BY FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., TO MOTION FOR PARTICIPATION OF THE RABBINICAL ASSOCIATION OF GREATER MIAMI, et al., AND BRIEF FILED PURSUANT THERETO

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The FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., by and through undersigned counsel, hereby responds to the motion by THE RABBINICAL ASSOCIATION OF GREATER MIAMI, TEMPLE BETH OR, AND RABBI RAMI SHAPIRO, Ph.D. (hereinafter "RABBINICAL ASSOCIATION") to participate as amicus curiae in this action, and would show as follows:

1. The FLORIDA SOCIETY OF OPHTHALMOLOGY, INC. ("FSO") is a respondent in this matter. On or about April 2, 1987, FSO's legal counsel was contacted by Benedict P. Kuehne, Esq. regarding filing an amicus curiae brief on behalf of the RABBINICAL ASSOCIATION in this proceeding. No discussion regarding the contents or argument in that brief was had between the undersigned and Mr. Kuehne.

2. As a matter of professional courtesy, FSO's counsel consented to the filing of amicus curiae brief by the RABBINICAL ASSOCIATION. FSO has no reason to deny any interested party the right to take part in the matters on appeal.

3. However, it is evident that the basis for the RABBINICAL ASSOCIATION'S arguments in its amicus curiae brief are not consistent with the issues on appeal. That is, RABBINICAL ASSOCIATION interjects a religious claim based on the free exercise clause of the First Amendment, an assertion not heretofore made part of the record in this case.

4. It is necessary for FSO to qualify its prior consent to RABBINICAL ASSOCIATION'S request to intervene as amicus curiae in order to make clear to this

Honorable Court what FSO intended in that consent. FSO readily consents to the filing of amicus curiae briefs by interested and affected parties, but only so long as such briefs contain claims already part of the record on appeal.

5. FSO has notified RABBINICAL ASSOCIATION of the filing of this response and the rationale for FSO's position.

WHEREFORE, FLORIDA SOCIETY OF OPHTHALMOLOGY, INC. requests this Honorable Court take notice of the nature of the consent given RABBINICAL ASSOCIATION by FSO regarding participation in this appeal, including the intended limitations of that consent as set forth herein.

Submitted this 27 day of April, 1987.

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Supreme Court, U.S.
FILED
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v.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS', NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., and FLORIDA LIONS EYE BANK, INC., RESPONSE OPPOSING MOTION TO PARTICIPATE AS AMICUS CURIAE

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Respondents, NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., and FLORIDA LIONS EYE BANK, INC., object to the Motion of the Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Shapiro seeking leave to participate as *amicus curiae* in the above case, on the following grounds:

1) The Motion for *amicus* participation is an attempt to interject a particular religious argument based on the Free Exercise Clause into a case which does not concern religion and in which no religious objection has ever been raised anywhere in the record.

2) The Florida Supreme Court in the opinion from which certiorari is sought refused to permit raising of any religious arguments since there was no record support for a religious objection:

> The record contains no evidence that the appellees' objections to the removal of corneal tissues for human transplants are based on any "fundamental tenets of their religious beliefs." *Wisconsin v. Yoder,* 406 U.S. at 218, 92 S.Ct. at 1534. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id.* at 215-16, 92 S.Ct. at 1533.

State of Florida v. Powell, 497 So.2d 1188, 1193 (Fla. 1986).

3) No claim based on a religious objection was ever argued to the trial court, nor considered or relied on by any trial or appellate court in this case.

4) The Rabbinical Association attempts simply to introduce into this case one particular religious creed in

the abstract, with no record showing that any Petitioner sincerely adheres to that religious belief. Where there is no record support for a party's religious objection based on his sincere religious belief, claims based on the Free Exercise Clause may not be raised. *See Harris v. McRae,* 448 U.S. 297 (1980).

5) Contrary to representations in the motion, all principal Respondents do, indeed, object to *amicus* participation by this group. These Respondents have been informed by the Attorney General's office that the State of Florida gave its consent only upon its understanding that *all* other Respondents had consented. Clearly not all Respondents have consented, as practically all have voiced objection. Because of this, even the State of Florida has not properly consented.

Because there is no record support for any issue of religion having been raised in this case, *amicus* participation by representatives of a particular religious sect is clearly inappropriate. Moreover, according to Supreme Court Rule 36, an *amicus curiae* supporting a petition for writ of certiorari is not favored when consent has been refused:

> A motion for leave to file such a brief when consent has been refused is not favored.

Because most of Respondents object to *amicus* participation by this religious group, leave should be denied and the group's Brief should be returned.

Respectfully submitted, this 27 day of April, 1987.

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Supreme Court, U.S.
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IN THE

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WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN,
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THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC.,
FLORIDA SOCIETY OF OPHTHALMOLOGY, INC.,
METROPOLITAN DADE COUNTY
AND THE FLORIDA MEDICAL ASSOCIATION,
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PETITIONERS' REPLY

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STATE OF FLORIDA, et al.,

Respondents.

PETITIONERS' REPLY

This Court should grant certiorari because of the great importance of the issues presented in this case. Respondents themselves argue that the challenged statutory scheme has great social importance by noting that, since the adoption of the statute, there has been a seven fold increase in corneal transplants. Eye Banks brief at 2. Because of this impact on transplan-

tation, other states have been adopting similar statutes. See Appendix to Petition for Certiorari at 82-102. Such statutes also have a great impact on the thousands of families whose decedents' corneas are being taken for transplantation without their consent. Thus, the challenged statute has a significant impact, and its constitutionality is a matter of great importance.

It appears that the thrust of respondents' argument is that no substantial federal question exists. This is incorrect. Important constitutional questions are presented here. This case is not, as respondents would characterize it, a state law case. Respondents' focus on tort and property case law which developed to assure the proper burial of the dead is inappropriate. This case law does not control here because this case

involves more than tortious interference with burial; it involves a state sanctioned scheme to harvest the bodies of the dead without the consent of the decedent or the next of kin. When the state case law discussed by respondents developed, burial of the corpse, or disposal by some other means, were the only responses to death. Technology has made another alternative available: the transplantation of tissues and organs from the dead to the living. Those early cases did not, and could not, have contemplated this development, and those cases cannot give guidance here.

The state's approach -- that this case should be decided through the mechanical application of traditional doctrine relating to the burial of the dead -- has already created problems. Relying on that case law, the state

contends here that petitioners have "no cognizable property interest in the remains of their decedents such as would entitle them to constitutional protection." State's brief at 7. [1] However, the state recently charged five individuals with grand theft in the second degree for involvement in a scheme to sell corneas for profit outside the United States. The state is contending

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[1] It is not clear whether the State's argument is based upon its position that a cornea is not "property," or that it is property, but not the property of petitioners. It is hard to see how a child, which is literally the flesh of the parents, could "belong" to anyone but the parents at death. Therefore, the argument appears to be that the cornea is not property. The court below was similarly unclear on this point, Appendix to Petition for Certiorari at A. 18-22. However, one authority quoted by the court stated, "there is no property in a dead body in a commercial or material sense," Appendix to Petition for Certiorari at A. 22, which implies that the court below was of the opinion that corneas were not property.

that corneas are valuable property in that prosecution. [2] The position that corneal tissue taken from decedents' families without their consent is not

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[2] State of Florida v. Robert Smith Grant, et al., Case #87-4613, Circuit Court for the 13th Judicial Circuit in and for Hillsborough County, Florida. Prosecutors alleged that the defendants intercepted corneas intended for a Tampa tissue bank and sold them in Saudi Arabia, Argentina, and other unspecified countries. Each of the five defendants who were charged with second degree grand theft in a 22 count information face possible sentences of 236 years in jail and fines of $236,000. See "6 Charged in Cornea Scheme," The Miami Herald, April 16, 1987 at 26 A; "6 Charged in Sales of Corneas," Ocala Star Banner, April 16, 1987 at 3B. An essential element of the charge of grand theft in the second degree is the taking of property of a value of more than $100 and less than $20,000. Section 812.014(2) (b)1., Florida Statutes. These allegations are in stark contrast to the state's position in these proceedings that, "there is no fair market value for corneal tissue," and, "there does not seem to be any reasonable basis for calculating the fair market value of corneal tissue." State's brief at 12.

property until after it is on the way to the tissue bank defies logic. A more consistent position would be that human tissue is property, and may only be removed from decedents consistent with the requirements of due process of law. The state's failure to develop a consistent position on this matter will continue to create problems for regulation in this area.

The absence of careful analysis which created the state's present dilemma is not uncharacteristic of the jurisprudence in this area. Of the three cases which have decided challenges to cornea removal statutes, [3] only the

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[3] Tillman v. Detroit Receiving Hospital, 138 Mich. App. 683, 360 N.W. 2d 275 (1984), appeal denied, No. 75442 (Mich. June 3, 1985). (Appendix to Eye Bank brief at A. 7.); Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60, 335 S.E. 2d 127, 1 (1985), cert. denied ____ U.S. _____, 106 S.Ct. 1464, 89 L.Ed.2d

decision below attempted serious consideration of the constitutional issues presented. This Court should not await further decisions before it acts. The trend which is developing clearly demonstrates a need for guidance from this Court. This Court should act to guarantee that regulation in this important area will develop in a consistent and constitutional manner.

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721 (1986). (Appendix to Shutze brief at A. 19); State of Florida v. Powell, 497 So.2d 1188 (Fla. 1986). (Appendix to Petition for Certiorari at A.-1.)